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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 112486

CASE NBR 86-1-00139 CFX
SHORT TITLE Newport, KY, et al.
VERSUS Iacobucci, Nicholas, et al.

DOCKETED: Jul 25 1986

| Date | Proceedings and Orders |
|---|---|
| Jul 25 1986 | Petition for writ of certiorari filed. |
| Aug 22 1986 | Order extending time to file response to petition until September 13, 1986. |
| Sep 10 1986 | Brief of respondent Nicholas A. Iacobucci, etc. in opposition filed. |
| Sep 17 1986 | DISTRIBUTED. October 10, 1986 |
| Oct 3 1986 | Reply brief of petitioners Newport, KY, et al. filed. |
| Oct 14 1986 | REDISTRIBUTED. October 17, 1986 |
| Oct 24 1986 | REDISTRIBUTED. October 31, 1986 |
| Nov 3 1986 | REDISTRIBUTED. November 7, 1986 |
| Nov 10 1986 | REDISTRIBUTED. November 14, 1986 |
| Nov 17 1986 | Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting statement by Justice Marshall. Dissenting opinion by Justice Stevens with whom Justice Brennan joins. Opinion per curiam. |

CONTINUE (

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# PETITION FOR WRIT OF CERTIORARI

86-139

No. _____



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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CITY OF NEWPORT, KENTUCKY, ET AL.,
PETITIONERS,

vs.

NICHOLAS A. IACOBUCCI, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is the decision of the United States Supreme Court in *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981), applicable only to situations when a state or its political subdivisions may by direct legislation totally ban the sale of alcoholic beverages?

2. Is the City of Newport Ordinance, Commissioners Ordinance 0-82-85, void for vagueness because of the use of the word simulation in the ordinance?

3. Has the Commonwealth of Kentucky sufficiently delegated its authority under the Twenty-First Amendment to the United States Constitution to municipalities in Kentucky to enable cities in Kentucky to adopt a ban on nudity in business establishments licensed to sell alcohol?

## PARTIES

The petitioners in this action are the City of Newport, Kentucky, its Board of Commissioners at the time the Ordinance was adopted, namely, Irene Deaton, Laura Bradley, Steve Goetz, Tom Ferrara and Fred Osburg, former City Manager, Ralph Mussman, former City Solicitor, Wil Schroder and Mike Whitehead, Liquor Administrator. The respondents are owners and/or managing agents of various establishments in Newport licensed to sell alcohol, namely Nicholas A. Iacobucci, Ray Thomas Sexton, Thomas Ray Chambers, Raymond W. Chambers, Roger J. Petersen, 924 Inc., Tom Chambers, Inc. and Bral, Inc.



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### OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-40a) is reported at 785 F.2d 1354. The judgment and opinion of the District Court (App., *infra*, 44a-55a) are unreported.

### JURISDICTION

The judgment of the Court of Appeals (App., *infra*, 41a) was entered on March 20, 1986. A petition for rehearing was denied on May 9, 1986 (App., *infra*, 42a-43a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND LOCAL ORINANCE INVOLVED

This case involves the constitutionality of Ordinance No. 0-82-85 (App., *infra*, 56a-61a), adopted by the Board of Commissioners of the City of Newport, Kentucky. The crucial portion of the ordinance is set forth in Section II of the ordinance and provides as follows:

> It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof.

This case may also turn on the following Kentucky statutes relating to the regulation of alcohol.

Kentucky Revised Statute (KRS) 241.160 provides as follows:

> The legislative body of any city of the first, second, third or fourth class in which traffic in alcoholic beverages is not forbidden by KRS Chapter 242 shall by ordinance create the office of city alcoholic beverage control administrator, or shall assign the duties of this office to a presently established city office.

Likewise, KRS 241.190 provides:

> The functions of each city administrator shall be the same with respect to city licenses and regulations, as the functions of the board with respect to state licenses and regulations, except that no regulation adopted by a city administrator may be less stringent than the statutes relating to alcoholic beverage control, or than the regulations of the board. No regulation of a city administrator shall become effective until it has been approved by the board.



Also, the pertinent provision of KRS 243.070 provides:

> The city legislative body of any city in which traffic in alcoholic beverages is not prohibited under KRS Chapter 242 may impose license fees for the privilege of manufacturing and trafficking in alcoholic beverages.

Finally, KRS 243.370 provides:

> If an applicant proposes to do business in a county or city in which a county or city license is required for the manufacture, sale or transportation of alcoholic beverages, he shall be ineligible to apply for a state license unless his application for a county or city license has first been approved by the county administrator or city administrator.

## STATEMENT

This case began as an attempt by several bar owners offering adult entertinment to challenge two regulatory measures adopted by the Board of Commissioners of the City of Newport, which apply exclusively to establishments licensed to sell alcohol in the City of Newport. The action was filed in Federal District Court for the Eastern District of Kentucky pursuant to 42 U.S.C. § 1983. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and § 1343.

Ordinance 0-82-56, which is not involved in this petition, requires employees in establishments where alcohol is sold to register with the Newport Police Department. Ordinance 0-82-85 (App., *infra*, 56a-61a), referred to hereinafter as the "Nude Dancing Ordinance," prohibits nudity in establishments licensed to sell alcohol by the City of Newport. This Ordinance is almost identical to the regulation approved by this Court in *New York Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981), and was adopted by the City of Newport to curb problems associated with establishments that offer nude dancing in the City of Newport.

After the parties stipulated basic facts, submitted memoranda of law and participated in oral argument, the trial judge entered an opinion and judgment (App., *infra*, 44a-55a) upholding both ordinances. On appeal a unanimous panel of the Court of Appeals affirmed the trial court as to the registration ordinance, Ordinance 0-82-56, but a majority of the panel reversed and remanded as to the nude dancing ordinance and held that the decision of *New York State Liquor Authority* v. *Bellanca*, *supra*, applied only to situations where a state or local government can by direct legislation totally ban the sale of alcohol.

The majority decision as to the nude dancing ordinance does not decide two issues which involve whether there has been a delegation of Kentucky's Twenty-First Amendment authority to the City of Newport in this case and whether the ordinance is void for vagueness because of the use of the word "simulation." The dissent filed by Judge Potter (App., *infra*, 21a-40a) addresses these issues in detail. Therefore, should the writ be granted in this case, the petitioners request that these issues also be considered since they only involve issues of law.



## REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision in this case misinterprets two controlling decisions of this Court and undermines the comprehensive statutory scheme adopted by the Kentucky General Assembly, that provides for the regulation of the sale of alcohol in Kentucky.

### I. THE SIXTH CIRCUIT'S DECISION IN THIS CASE MISINTERPRETS TWO CONTROLLING DECISIONS OF THIS COURT.

The nude dancing ordinance adopted by the City of Newport is taken almost word for word from the regulation approved by this Court in *New York State Liquor Authority* v. *Bellanca*, *supra*. In *Bellanca*, which follows the decision of *California* v. *Larue*, 409 U.S. 109 (1972), this Court held that a state's broad powers to regulate alcohol as provided by the Twenty-First Amendment to the United States Constitution, overcomes any First Amendment protection associated with nude dancing. However, the Sixth Circuit in interpreting *Bellanca* takes a clause from the opinion out of context and holds that *Bellanca* only applies when the state or local government may by direct legislation totally ban the sale of alcohol. (App., *infra*, 9a). Therefore, the Sixth Circuit holds, that in Kentucky the *Bellanca* decision does not apply since pursuant to Section 61 of the Kentucky Constitution and Chapter 242 of the Kentucky Revised Statutes, only the voters have the authority to ban the sale of alcohol entirely.(App., *infra*, 9a). This reading of *Bellanca* by the Sixth Circuit is clearly wrong and inconsistent with the basic rationale of the *Bellanca* decision.

This Court in *Bellanca* at 717 did state, "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on

premises where topless dancing occurs." It seems obvious, however, that this phrase used by the Sixth Circuit to justify its holdings was simply a recognition by this Court, that based upon the federal constitution states have the authority to totally ban the sale of alcohol. Simply because a state may have to comply with a unique provision of its constitution to effectuate a total ban on the sale of alcohol, does not lessen the authority granted by the Twenty-First Amendment from a federal constitutional standpoint. Judge Potter in his well-reasoned and detailed dissent, filed in this case below, hit the nail on the head when he wrote:

> The majority concludes that the City cannot exercise ". . . in part a power that it does not hold in full." I find that the majority reads *Bellanca* much too narrowly. The thrust and the "doctrine" of *Bellanca* should not be limited to the one phrase "(t)he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." The trial court did not base its opinion on this limited basis. (App., *infra*, 26a).

This Court in *Bellanca* and *California* v. *Larue*, *supra*, at no time made reference to state law when it decided that the particular state's law involved in those cases would be free from a First Amendment challenge based upon the Twenty-First Amendment. A similar result occurred in *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939), wherein this Court upheld a Kentucky liquor statute based upon the state's Twenty-First Amendment powers, from a challenge under the Commerce Clause. In language similar to that found in *New York State Liquor Authority* v. *Bellanca*, *supra* the Court in *Ziffrin, Inc.* at 138, stated:



> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative.

Section 61 of Kentucky Constitution was in effect when this Court decided *Ziffrin, Inc.* v. *Reeves*, *supra*. However, at no time in the case, did this Court find that the Kentucky Constitution placed a limitation upon the power granted Kentucky by the Twenty-First Amendment.

## II. THE SIXTH CIRCUIT'S DECISION IN THIS CASE UNDERMINES THE COMPREHENSIVE STATUTORY SCHEME ADOPTED BY THE KENTUCKY GENERAL ASSEMBLY, THAT PROVIDES FOR THE REGULATION OF THE SALE OF ALCOHOL IN KENTUCKY.

The majority below also questions whether Kentucky municipalities have been delegated authority to regulate the sale of alcohol. For instance the majority writes, "A city cannot exercise in part a power that it does not hold in full, . . . (App., *infra*, 9a). This statement simply ignores the Kentucky statutes and case law relating to the regulation of alcohol. Cities in Kentucky share concurrent responsibility with the state for the regulation of alcohol. For instance, Ky. Rev. Stat. 241.160 (*infra*, 2) requires cities wherein alcoholic beverages are sold to appoint a local administrator. The local administrator has the same duties and responsibilities as to local licenses the State Board has to state licenses. Ky. Rev.

Stat. 241.190 (*infra*, 2-3). Likewise, Ky. Rev. Stat. 243.070 (*infra*, 3) grants authority to impose license fees upon the sale of alcohol. In addition, Ky. Rev. Stat. 243.370 (*infra*, 3) prohibits the issuance of a state liquor license until the local administrator has approved the license. Several Kentucky cases have clearly held that the authority granted to license places that sell alcohol by KRS 243.070, includes the power to regulate the circumstances of sale. *Deckert* v. *Levy*, 308 Ky. 67, 213 S.W.2d 431 (1948); *City of Bowling Green* v. *Gasoline Marketers*, 539 S.W.2d 281 (Ky. 1976). For instance, in the *City of Bowling Green* case, the Kentucky Supreme Court at 284 and 285 stated:

> In the case at bar the city legislative body of a second class city has been given specific authority by KRS 243.070 to impose license fees for the privilege of trafficking in alcoholic beverages, and that privilege is broad enough to include the right to regulate the nature of the premises from which beer can be sold.

In light of the above referred to statutes and case law it is surprising that the Sixth Circuit would question whether cities in Kentucky had been granted the authority to regulate alcohol. It is clear that cities in Kentucky have been expressly delegated this authority. Indeed the legislative scheme set forth in Chapters 241 through 244 involves a system of shared powers between the state and its political subdivisions. So long as a local ordinance does not conflict with a state statute or regulation, the local ordinance will be upheld. *City of Bowling Green* v. *Gasoline Marketers, supra.*



## CONCLUSION

In conclusion the decision of the Sixth Circuit in this case contradicts the decisions in two controlling United States Supreme Court cases. In addition, the decision ignores the law in Kentucky as to the authority of municipalities in the state to regulate alcohol. Since the decision will effect all cities in Kentucky, as well as the authority of the State of Kentucky to regulate alcohol, the petitioners respectfully request that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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# APPENDIX

*RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

No. 83-5471

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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NICHOLAS A. IACOBUCCI, d/b/a TALK OF THE TOWN, et al.,
*Plaintiffs-Appellants,*
v.
CITY OF NEWPORT, KENTUCKY, et al.,
*Defendants-Appellees.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

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Decided and Filed March 20, 1986

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Before: KEITH and MARTIN, Circuit Judges; and POTTER, District Judge.*

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge joined. POTTER, District Judge, (pp. 21a-40a) delivered a separate opinion concurring in part and dissenting in part.

BOYCE F. MARTIN, JR., Circuit Judge. This appeal challenges the constitutionality of two ordinances of the City of Newport, Kentucky. Ordinance 0-82-85 prohibits nude or nearly nude dancing in establishments selling liquor by the drink, and provides for both criminal and civil sanctions. The second ordinance,

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* The Honorable John W. Potter, United States District Judge for the Northern District of Ohio, sitting by designation.

0-82-56, requires certain employees of such establishments to register with the Newport police department, to be fingerprinted, photographed, and to procure an identification card. The appellants are managing agents of retail liquor establishments which provide live entertainment including nude and nearly nude dancing. They claim that the ordinances deprive them of their constitutional rights in violation of 42 U.S.C. § 1983, and seek a declaratory judgment and permanent injunctive relief against enforcement of the ordinances.

The fingerprinting ordinance, 0-82-56, provides in pertinent part:

> 1. Any person employed in any capacity in any establishment or place of business, except as hereinafter provided, where liquor or beer is sold or dispensed by the drink as defined in both the Kentucky Revised Statutes and the Newport City Ordinances, shall register in a book of registration to be kept by the Newport Police Department, and is hereby required to be fingerprinted or photographed by the Police Department of the City of Newport within five (5) days from the time of his or her employment. No such person shall fail to register, be fingerprinted or photographed.
>
> 2. No employer, whether a person, firm or corporation, shall allow any person to remain in such employment longer than five (5) days unless within such five (5) day period, the employee shall have registered and shall have been fingerprinted and photographed.
>
> 3. The registrants are required to have in their possession the identification cards issued by the Newport Police Department on their persons during



> their hours of employment in establishments selling or dispensing liquor or beer by the drink.[1]

Later sections exempt persons whose "primary function is the service of food." The penalty for violation of this ordinance is a fine of not less than twenty-five nor more than five hundred dollars, which can be assessed against both the employee and employer.

The proprietors in this case claim that the fingerprinting ordinance infringes upon their rights under the first, ninth, and fourteenth amendments. They contend that their right of privacy and right of association are specifically threatened by this enactment, citing *Griswold v. Connecticut*, 381 U.S. 479 (1965). We do not believe that any fundamental constitutional rights are implicated by this ordinance. Because the ordinance bears a rational relationship to a legitimate governmental interest, we view it as a proper exercise of the City's police power. *People v. Stuller*, 10 Cal. App. 3d 582, 89 Cal. Rptr. 158 (Cal. Ct. App. 1970), *cert. denied*, 401 U.S. 977 (1971); *Sibert v. Dep't of Alcoholic Beverage Control*, 169 Cal App. 2d 563, 337 P.2d 882 (Cal. Dist. Ct. App. 1959); *Friedman v. Valentine*, 177 Misc. 437, 30 N.Y.S.2d 891 (N.Y. Sup. Ct. 1941), *aff'd*, 266 A.D. 561, 42 N.Y.S.2d 593 (1943).

Newport's fingerprinting ordinance does not contain a statement of its purpose. The district judge discussed Newport's "tarnished image" and concluded that correcting this image constituted a rational basis for the ordinance. The City asserts that the ordinance would facilitate enforcement of various state laws regulating retail liquor establishments. While a specific statement

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[1] The complete text of both Ordinance 0-82-56 and 0-82-85 is contained in the attached Appendix.

of the purpose of the ordinance should have been included in its text, fingerprints and photographs of those serving alcohol will clearly further compliance with the Kentucky statute prohibiting minors and convicted felons[2] from serving alcohol in any retail establishment, K.R.S. § 244.090. Newport's notorious crime problems intensify the necessity of such compliance; a remand for a statement to this effect is therefore not required. *See, e.g., Friedman v. Valentine*, 30 N.Y.S.2d at 894 ("That an unsupervised cabaret offers a tempting field for abuses and crimes is almost axiomatic.")

Courts have consistently upheld the constitutionality of similar ordinances as valid implementations of the police power. In *People v. Stuller*, 10 Cal. App. 3d 582, 89 Cal. Rptr. 158 (Cal. Ct. App. 1970), *cert. denied*, 401 U.S. 977 (1971), a bartender's fingerprints taken pursuant to a virtually identical ordinance were admitted as evidence in his trial for rape. In rejecting the defendant's claim that the ordinance authorized an unconstitutional invasion of his privacy, the *Stuller* court noted the minimal nature of the intrusion involved in registration and fingerprinting, and listed the numerous non-criminal situations in which fingerprints are required. 89 Cal. Rptr. at 166-67.

A New York Police Commission regulation requiring the registration and fingerprinting of all cabaret employees was upheld in *Friedman v. Valentine*, 177 Misc. 437, 30 N.Y.S.2d 891 (N.Y. Sup. Ct. 1941), *aff'd*, 266 A.D. 561, 42 N.Y.S.2d 593 (1943). The court held

[2] As the result of a 1978 amendment, section 244.090(1)(a) prohibits a liquor licensee from employing any person who "has been convicted of any felony, misdemeanor or offense directly or indirectly attributable to the use of intoxicating liquors, within the last two (2) years." Additionally, minors, aliens, and those who have violated liquor laws are not eligible for employment. K.R.S. § 244.090(1)(b)-(d).



that the regulation was justified by conditions in the cabaret industry, stating "[n]o one can seriously argue against the conclusion that persons employed in cabarets and by their concessionnaires have especially favorable opportunities to victimize patrons of such establishments." 30 N.Y.S.2d at 895. *Friedman* was reaffirmed in *Simone v. Kennedy*, 26 Misc. 2d 748, 212 N.Y.S.2d 838, 840 (N.Y. Sup. Ct. 1961), in which the court approved the police department's practice of charging fees for the identification cards required by the ordinance.

The *Friedman* reasoning helped pave the way for a federal case on fingerprinting requirements, *Thom v. N.Y. Stock Exchange*, 306 F.Supp. 1002 (S.D.N.Y. 1969), *aff'd sub nom. Miller v. N.Y. Stock Exchange*, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970). *Thom* upheld the constitutionality of a New York state statute requiring fingerprinting of all employees of member firms of national security exchanges registered with the Securities and Exchange Commission and all employees of affiliated cleaning corporations. The court rejected the plaintiff's privacy argument, observing that fingerprinting "is only a means of verifying the required information as to the existence or nonexistence of a prior criminal record . . . [t]he actual inconvenience is minor; the claimed indignity, nonexistent; detention, there is none; nor unlawful search; nor unlawful seizure." *Id.* at 1009. *See also id.* at 1007 n. 17 (citing federal and state cases upholding fingerprinting requirements); *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969) (recognizing the minimal intrusiveness of the fingerprinting process).

The Durham, North Carolina City Council adopted a similar, but more extensive, ordinance regulating massage parlors. The ordinance requires all applicants for licenses for massage businesses to be fingerprinted

and photographed, and to submit to medical examinations. The constitutionality of this ordinance was upheld in *Brown v. Brannon*, 399 F. Supp. 133, 138-39 (M.D.N.C. 1975), *aff'd*, 535 F.2d 1249 (4th Cir. 1976). The *Brown* court concluded that the ordinance was rationally related to a valid state interest: "[T]he photographing and fingerprinting obviously serve to aid police and administrative personnel in identifying and investigating potential applicants for a license. . . . The records also would aid in the efforts of North Carolina relating to offenses against public morality and decency." *Id.* at 139.

Fingerprints are required by states and cities in many non-criminal situations, most often in connection with applications for licenses or permits. *See, e.g.*, Ky., Sup. Ct. R. 2.020(2) (requiring fingerprints of applicants for the bar); Louisville, Ky., Code §§ 73.22, 112.15(2) (requiring photographs and fingerprints of applicants for licenses for numerous occupations, including auctioneers, fortune tellers, and collecting agencies); Louisville, Ky., Code § 114.049(A)-(D) (requiring fingerprinting of all applicants for retail liquor licenses and authorizing the Director of Safety to require fingerprinting of all "stockholders, agents, or employees of a licensed corporation" if he has reasonable grounds to believe the person has a prior criminal record.)

Newport's fingerprinting ordinance serves corresponding goals. Because no fundamental right is threatened by the ordinance, it will be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). We believe that the ordinance legitimately furthers Kentucky's objective of screening employees of retail liquor establishments, and advances the city's goal of eliminating crime. *Cf. International Soc. for*



*Krishna Consciousness v. City of Houston*, 689 F.2d 541, 556-57 (5th Cir. 1982) (upholding city ordinance requiring religious solicitors to comply with registration and financial disclosure requirements, and to carry identification cards); *Hamilton v. New Jersey Real Estate Comm'n.*, 117 N.J. Super. 345, 284 A.2d 564 (N.J. Super. 1971) (upholding Real Estate Commission regulation requiring all applicants for salesman, broker-salesman, or broker's licenses to be fingerprinted); *Playboy Club of New York, Inc. v. O'Connell*, 18 A.D. 339, 239 N.Y.S.2d 262 (N.Y. App. Div. 1963), *aff'd*, 248 N.Y.S.2d 226, 197 N.E.2d 662 (N.Y. 1964) (upholding regulation of department of licenses that female cabaret employees are prohibited from mingling with patrons). *Compare Wulp v. Corcoran*, 454 F.2d 826, 834 (1st Cir. 1972) (ordinance requiring newspaper vendors to obtain a license and to wear a badge held unconstitutional because printed materials distributed anonymously "have played an important role in the progress of mankind".); *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970) (same). *Wulp* and *Strasser* involved undisputed first admendment concerns; no comparable governmental interest is threatened by this ordinance.

Judicial authority is therefore in agreement that requiring fingerprints of employees of retail liquor establishments bears a rational relationship to the legitimate goal of crime prevention. The operators of the Newport establishments present essentially the same arguments rejected in these earlier cases. Whatever the outer limits of the right to privacy, clearly it cannot be extended to apply to a procedure the Supreme Court regards as only minimally intrusive. Enhanced protection has been held to apply only to such fundamental decisions as contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and family living arrangements, *Moore*

v. *City of East Cleveland*, 431 U.S. 494 (1977). Fingerprints and photographs have not been held to merit the same level of constitutional concern.

We also reject the proprietors' argument that the fingerprinting ordinance interferes with their freedom to pursue the occupation of their choice. Although government may not unreasonably interfere with a citizen's pursuit of his occupation, *Wilkerson* v. *Johnson*, 699 F.2d 325, 327-28 (6th Cir. 1983), this fingerprinting ordinance places no categorical restrictions on those who may be employed in retail liquor establishments. Compliance with the ordinance is not a sufficiently serious impediment to the pursuit of employment in a retail liquor establishment to merit constitutional protection. *Hampton* v. *Mow Sung Wong*, 426 U.S. 88 (1976) (invalidating a civil service rule barring all non-citizens from employment in the federal civil service system). We therefore reject the proprietors' claim, and affirm the lower court's ruling as to ordinance 0-82-56.[3]

The challenge to Newport's nude dancing ordinance raises many different and complex legal issues. After reviewing the arguments presented in the parties' briefs and at oral argument, this Court determined that the district court and the parties had proceeded on the basis that the case involved a conflict between the twenty-first amendment and other constitutional rights and therefore failed to discuss the questions of delegation, preemption, or the application of the Supreme Court's reasoning in *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714 (1981) to the facts of this case. The parties were therefore directed to file supplemental briefs on these issues.

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[3] Newport's fingerpringing ordinance is supplementary to the State's regulatory scheme, and thus is within the City's regulatory power. *City of Bowling Green* v. *Gasoline Marketers, Inc.*, 539 S.W.2d 281, 284 (Ky. 1976).



Newport's nude dancing ordinance is almost identical to the New York State statute held constitutional in *Bellanca*. The district court stated that the nude dancing ordinance is constitutional because it "is squarely within the doctrine of *Bellanca*." Because we do not agree that the doctrine of *Bellanca* applies in this case, we need not address the question of delegation of twenty-first amendment authority from the state to the city.

The rationale of the *Bellanca* decision is that, "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Bellanca*, 452 U.S. at 717. Given the express statutory authorization for cities to conduct popular elections on the question of local prohibition, *see* K.R.S. §§ 242.010-242.990, as required by the Kentucky Constitution,[4] it is very doubtful that a city in Kentucky may *by ordinance* "ban the sale of alcoholic beverages entirely." Therefore, even assuming that Kentucky has, in some metaphysical sense, delegated its twenty-first amendment power to the City of Newport, the ordinance does not fall within the *Bellanca* doctrine. A city cannot exercise in part a power it does not hold in full, and the citizens of the city have not chosen to exercise the power granted to them by K.R.S. §§ 242.010-242.990 and § 61 of the Kentucky Constitution.

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[4] Section 61 of the Kentucky Constitution provides:

> **Provisions to be made for local option on sale of liquor—Time of elections.**—The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days.

Because we believe that *Bellanca's* rationale does not apply to the facts of the instant case, we do not reach the state law question of delegation of authority from the state to the city. This determination does not, however, dispose of the matter, because the city may still justify the ordinance as an appropriate exercise of its police power. In *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 944 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982), the Eleventh Circuit observed:

> We initially note that the Supreme Court in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981), upheld a similar state statute on the basis of authority conferred under the Twenty-first Amendment. *Bellanca* does not, however, resolve the issue before us because Cocoa Beach, a municipality lacking any delegated regulatory authority under the Twenty-first Amendment, is required to justify the ordinance solely as a legitimate exercise of its police power.

*See also Kreuger v. City of Pensacola*, 759 F.2d 851, 854-55 (11th Cir. 1985) ("Because Florida has not delegated its regulatory authority to municipalities, however, Pensacola must justify its ordinance under the stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power.").

While the exact amount of proof necessary to satisfy this "stricter standard" is an issue properly left to the discretion of the district court, we note that no substantive evidence concerning the government's justifications for the ordinance was presented below. We agree with the Eleventh Circuit that "[w]here such fundamental interests as free speech are at issue . . . we require more



than simply an articulation of some legitimate interest that the city could have had." *Kreuger*, 759 F.2d at 855. Specifically, no evidence was presented relating the crime rate in bars lacking such entertainment. The preamble to the ordinance, standing alone, is insufficient evidence of the motivating factors in its passage. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-73 (1981); *City of Miami Springs v. J.J.T., Inc.*, 437 So. 2d 200, 204 (Fla. Dist. Ct. App. 1983).

Of course, a municipality may not exercise its police power when local authority over the subject has been preempted by the state's exercise of its superior power to regulate the alcoholic beverage industry. *See, e.g., City of Bowling Green v. Gasoline Marketers, Inc.*, 539 S.W.2d 281, 284 (Ky. 1976); *City of Newport v. Tye*, 335 S.W.2d 340, 342 (Ky. 1960); *Commonwealth ex. rel. City of Hazard v. Day*, 287 Ky. 176, 152 S.W.2d 597 (Ky. 1941); *Die Burg, Inc. v. Underhill*, 465 F. Supp. 1176, 1178 (M.D. Fla. 1979). We express no view as to the resolution of this difficult issue, which was not raised below, but merely note that it must be addressed if the lower court, after hearing all the evidence, determines that the ordinance is an appropriate exercise of the city's police power.

Another issue which would arise upon such a determination is the susceptibility of the language "or simulation thereof" to an attack on vagueness grounds. Like the preemption issue, the vagueness challenge need not be addressed until a ruling on the City's police power authority is made by the court below. Clearly, however, the *Bellanca* decision is not dispositive on the issue, because a vagueness claim was not raised before the Supreme Court in that case.

We hold further that the ordinance does not constitute an impermissible prior restraint upon either present or

future restricted expression. The appellants' argument that their zoning status would be altered if their occupational licenses were revoked does not constitute a reason to invalidate the ordinance as a prior restraint. In this case, prescreening discretion is not vested in any administrative body, as in *Near v. Minnesota*, 283 U.S. 697 (1931), and the dangers of censorship are not present. A comparison of the dangers involved in systems of prior and subsequent restraint is contained in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979):

> An administrative censorship scheme provides less protection for expression than a system of subsequent punishment because it permits sanctions to be imposed for failure to obtain the censor's approval, regardless of the nature of the expression. Expression may be punished in a censorship scheme upon proof of one fact—the failure to obtain prior approval. A would-be speaker thus cannot ignore the censor, for later he will be unable to defend his expression on the ground that it posed no danger and therefore the censor could not have suppressed it consistent with the First Amendment. . . . In contrast, under a system of subsequent punishment, the state must show in each case that the particular expression which the state seeks to punish did in fact pose an immediate threat to an interest which the state has a right to protect. *Id.* at 184 n. 15 (citations omitted).

In summary, we hold only that the district court's determination that Newport's ordinance "falls squarely within the doctrine of *Bellanca*," cannot stand. We remand for a determination of the city's authority under the police power, and, if necessary, analysis of the preemption and vagueness issues. We affirm as to the fingerprinting ordinance.



## APPENDIX*

### ORDINANCE NO. 0-82-85

AN ORDINANCE OF THE CITY OF NEWPORT, KENTUCKY, PROHIBITING NUDE OR NEARLY NUDE ACTIVITIES IN ESTABLISHMENTS WITH A RETAIL DRINK LIQUOR LICENSE AND/OR RETAIL CEREAL MALT BEVERAGE LIQUOR LICENSE, AND PROVIDING FOR PENALTIES FOR VIOLATION THEREOF, INCLUDING THE SUSPENSION OR REVOCATION OF THE SAID RETAIL LIQUOR DRINK LICENSE AND/OR RETAIL CEREAL MALT BEVERAGE LIQUOR LICENSE AND THE REVOCATION OF THE ESTABLISHMENT'S OCCUPATIONAL LICENSE.

WHEREAS, numerous business establishments with a retail drink liquor license and/or retail cereal malt beverage liquor license from the City of Newport, Kentucky, provide adult entertainment for its patrons, such as nude or nearly nude dancing; and

WHEREAS, the City Commission of the City of Newport, Kentucky, determines such conduct or activities as injurious to the citizens of the City of Newport, Kentucky; and

WHEREAS, the City Commission of the City of Newport, Kentucky, believes that this Ordinance is necessary:

1. To protect property values;

2. To prevent blight and the deterioration of the City's neighborhoods;

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* Ordinances appear as filed by the parties in the Joint Appendix submitted on appeal.

3. To promote a climate conducive to a return of residences and businesses to the City's neighborhoods;

4. To enhance the quality of life within the City;

5. To presume [sic] and stabilize the City's neighborhoods; and

6. To decrease the incidence of crime, disorderly conduct and juvenile delinquency, now Therefore,

BE IT ORDAINED BY THE CITY OF NEWPORT, KENTUCKY:

## SECTION I

### DEFINITIONS:

A. "Business Establishments"—Shall mean a business within the City of Newport, Kentucky, where liquor, beer and/or wine is sold for consumption on the premises pursuant to a retail drink liquor license and/or retail cereal malt beverage liquor license that has been issued by the City of Newport, Kentucky.

B. "Liquor Administrator"—Shall mean the duly appointed Alcoholic Beverage Control Administrator of the City of Newport, Kentucky.

C. "Licensee"—Shall mean any person to whom a retail drink liquor license or a retail cereal malt beverage liquor license has been issued by the City of Newport, Kentucky, including the officers and agents of the licensee.

D. "License"—Shall mean a retail drink liquor license or a retail cereal malt beverage liquor license issued by the City of Newport, Kentucky.

E. "Occupation License"—Shall mean the occupational license issued for the business establishment pursuant to the City of Newport, Kentucky's Occupational License Ordinance.



F. "Person"—Shall mean a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental authority.

G. "Premises"—Shall mean the land and building in and upon which any business establishment regulated by alcoholic beverage statutes is carried on.

H. "Retail Licensee"—Shall mean any licensee including its officer and agents, who sells at retail any alcoholic beverage for the sale of which an occupational license is required.

## SECTION II

It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof.

## SECTION III

A license or retail licensee is guilty of permitting nude or nearly nude activity when having control of the business establishment's premises which it knows or has reasonable cause to know, is being used by any person to appear on the premises in such manner or attire as to expose to view portions of the pubic area, anus, vulva or genitals, or any simulation thereof; or used by any female to appear on the premises in such manner or attire as to expose to view any portion of the breast referred to as the areola, nipple, or any simulation thereof,

it permits such activity or fails to make reasonable and timely effort to halt or abate such activity or use.

## SECTION IV

A. Performing nude or nearly nude activities as set forth in Section II or permitting such activities as set forth in Section III is a Violation and punishment shall be fixed as set forth in the Kentucky Revised Statutes.

B. The second violation of Section II or Section III above within a twelve month period shall constitute a Class B Misdemeanor with punishment as set forth in the Kentucky Revised Statutes.

C. Three or more violations of Section II or Section III within a twelve month period shall constitute a Class A Misdemeanor with punishment as set forth in the Kentucky Revised Statutes.

## SECTION V

A. In the event that a violation of Section II and/or III of this Ordinance occurs, the City of Newport Liquor Administrator shall forthwith conduct a hearing pursuant to KRS 243.520 (in conjunction with 241.160 and 241.190), to determine whether the liquor license, at whose business establishment the activity prohibited by this Ordinance occurred, shall have his/her or its license suspended or revoked.

B. In the event three or more violations of Section II and/or III above occur at a business establishment within a twelve month period, the Liquor Administrator, after a hearing, shall revoke the said retail drink license or retail cereal malt beverage liquor license or both.



## SECTION VI

A. In the event that a violation of Section II or III above occurs, the City Manager shall prefer charges against the retail license pursuant to the Newport Code of Ordinances, sections 26-45 et seq. and after notice, a hearing etc. held by the Board of Commissioners, the occupational license shall either be revoked or suspended.

B. In the event that three or more violations of Section II or III above occur at a business establishment within a twelve month period, after notice and hearing etc. pursuant to the Newport Code of Ordinances sections 26-45 et seq., the Board of Commissioners shall revoke the occupational license of the retail licensee.

## SECTION VII

If any provision of this ordinance, or the application thereof, is held invalid, such invalidity shall not affect other provisions or other applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end, the provisions of the Ordinance are declared to be severable.

## SECTION VIII

This Ordinance shall be in full force and effect on October 1, 1982.

PUBLISHED: In Full in the Campbell County Recorder, the 13 day of September, 1982.

## COMMISSIONERS ORDINANCE NO. 0-82-56

AN ORDINANCE PROVIDING FOR THE REGISTRATION, PHOTOGRAPHING AND FINGER PRINTING OF ALL EMPLOYEES OF ESTABLISHMENTS THAT SELL LIQUOR OR BEER BY THE DRINK WITHIN THE CITY OF NEWPORT, KENTUCKY, AND PROVIDING PENALTIES FOR THE VIOLATION THEREOF.

BE IT ORDAINED BY THE CITY OF NEWPORT, KENTUCKY:

### SECTION I

REGISTRATION, PHOTOGRAPHING AND FINGER PRINTING OF EMPLOYEES.

1. Any person employed in any capacity in any establishment or place of business, except as hereinafter provided, where liquor or beer is sold or dispensed by the drink as defined in both the Kentucky Revised Statutes in the Newport City Ordinance, shall register in a book of registration to be kept by the Newport Police Department, and is hereby required to be finger printed and photographed by the Police Department of the City of Newport within five (5) days from the time of his or her employment. No such person shall fail to register, be finger printed and photographed.

2. No employer, whether a person, firm or corporation, shall allow any person to remain in such employment longer than five (5) days unless within such five (5) day period, the employee shall have registered and shall have been finger printed and photographed.

3. The registrants are required to have in their possession the identification cards issued by the Newport Police Department on their persons during their hours of



employment in establishments selling or dispensing liquor or beer by the drink.

4. The City of Newport shall require a payment of Ten ($10.00) Dollars of each person registered, which charge shall be sufficient to cover the cost involved in the procedure, including the cost of the identification card furnished to the registrants.

5. In those businesses having a liquor or beer by the drink license where another business is the principal user of the location, including but not limited to restaurants and hotels, only those persons who are directly engaged in that portion of that business which sell liquor or beer by the drink are subject to this section.

6. This registration procedure shall not apply to waiters and waitresses which [sic] primary function is the service of food.

7. Any establishment having a liquor or beer by the drink license that employs a contract cleaning service or other maintenance service to work in their establishment after closing hours, shall require those persons so employed by the contractor to wear an I.D. card while working in that portion of the establishment that is directly involved in the sale of liquor or beer by the drink. This special I.D. shall only list the persons [sic] name, address, and date of birth.

8. Any person, firm or corporation convicted of violating this section shall be fined not less than Twenty-five ($25.00) Dollars, no more than Five Hundred ($500.00) Dollars in the discretion of the Campbell District Court.

### SECTION II

Any section or part of a section or any provision of this Ordinance which is declared by a Court of appropriate jurisdiction, for any reason, to be invalid, such decision

shall not effect or invalidate the remainder of this Ordinance.

SECTION III

This Ordinance shall be signed by the Mayor, attested by the City Clerk, recorded, published, and effective at the time of publication.

PUBLISHED: In full in the Campbell County Recorder, the 10th day of June, 1982.



POTTER, District Judge, concurring in part and dissenting in part. I concur in the opinion of the majority as to the affirmance of the lower court's judgment relative to the fingerprinting ordinance. I respectfully dissent, however, to that portion of the majority decision holding that Ordinance No. 0-82-85 prohibiting nude or nearly nude activity does not come under the rationale of *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). The majority concludes that the ordinance must stand or fall under the city's authority under the police power and has remanded for such a determination.

Ordinance No. 0-82-85 provides in pertinent part as follows:

> It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view any portion of the breast referred to as the areola, nipple, or any simulation thereof, . . .

The preamble to Ordinance No. 0-82-85 sets out the legislative purpose of the ordinance. It states that nude or nearly nude dancing in business establishments selling liquor by the drink is "injurious" to the citizens of Newport, and that the ordinance is necessary to protect property values, prevent blight and deterioration of the City's neighborhoods, promote a climate conducive to a return of residences and businesses to the City's neighborhoods, enhance the quality of life within the City, stabilize the City's neighborhoods, and to decrease the

incidence of crime, disorderly conduct and juvenile delinquency.

The ordinance imposes civil as well as criminal sanctions. A proprietor who violates the ordinance may have both his liquor license and occupational license revoked.

The parties in the court below stipulated essentially the following:

A proprietor's liquor license may not be revoked without a notice and hearing. The City of Newport Liquor Administrator conducts a hearing to determine whether to suspend or revoke the license. The proprietor has the right to present evidence, be represented by counsel, and cross-examine witnesses. The ordinance is silent regarding the standards that the administrator is to use in determining whether to revoke the license for a first violation or second violation within a twelve-month period; revocation for a third violation within a twelve-month period is mandatory. Appellees state that Newport officials have interpreted the ordinance in such a way that the administrator may not find a "violation" of the ordinance unless the proprietor has been convicted of the violation.

A proprietor, within ten days of the Administrator's decision, may notice an appeal to the Kentucky State Board of Liquor Control. The hearing before that Board is *de novo*. Although a proprietor may appeal an adverse determination by the Board, pending appeal he may not conduct a liquor business.

Appeal from the Board's decision is to the Franklin Circuit Court. State law requires that the appeal be expedited, but the parties agree that the period from filing the notice of appeal to rendering of the decision is six months.

Notice and a hearing also are required in order to revoke a proprietor's occupational license. The Newport



Board of Commissioners determines whether to suspend or revoke the license. A proprietor, within thirty days, may appeal an adverse decision to the Campbell Circuit Court. That hearing is *de novo*. Pending review, the Commissioner's decision is effective unless stayed by the reviewing court.

As to Ordinance No. 0-82-85, appellants present this statement of issues:

> DID THE DISTRICT COURT PROPERLY DETERMINE THE ISSUE OF THE CLAIMED CONSTITUTIONAL REPUGNANCY OF ORDINANCE NO. 0-82-85 OF THE CITY OF NEWPORT, KENTUCKY, THE NUDE DANCING BAN ORDINANCE, IN THE COURT'S CONCLUSION THAT THE ORDINANCE DID NOT VIOLATE THE PRIVILEGES GRANTED BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AS TO THE VAGUENESS AND OVERBREADTH, FACIALLY AND AS APPLIED, OF THE ORDINANCE, ITS IMPOSITION OF AN IMPERMISSIBLE PRIOR RESTRAINT UPON PRESENT AND FUTURE PROTECTED EXPRESSION, AND ITS FAILURE TO POSSESS PROCEDURAL SAFEGUARDS?

As is stated in the majority opinion, the trial court held that the nude dancing ordinance is practically a copy of the statute upheld in *New York State Liquor Authority v. Belanca*, 452 U.S. 714 (1981) and it is "squarely within the doctrine of *Bellanca*, *supra*, and must be upheld on that basis."

On appeal, the issues quoted above were briefed, and

the appeal came on for oral argument. As stated in the majority opinion, at the hearing it was observed that the district court and the parties proceeded on the basis that the case involved a conflict between the Twenty-first Amendment and other constitutional rights and therefore failed to discuss the question of delegation of state authority.

Since the issue of delegation had not been discussed, e.g., see *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982), the panel presented to the parties the following issues to be briefed and submitted to the Court:

> (1) Does a valid delegation of twenty-first amendment authority from the state to the locality require only that the state permit localities to regulate broad aspects of the alcoholic beverage industry? Or, rather, does a valid delegation of twenty-first amendment authority from the state to the locality require that the state affirmatively and explicitly enable localities to regulate specific, well-defined aspects of the alcoholic beverage industry?
> Whichever principle is accepted, how does it apply to the Newport nude dancing ordinance?
>
> (2) Does a state preempt local regulation of nude dancing in establishments serving alcoholic beverages by refusing itself to regulate nude dancing in those establishments while regulating other activities that one might put in the same category as nude dancing? Or, rather, does a state preempt local regulation of nude dancing in establishments serving alcoholic beverages only by explicitly and affirmatively prohibiting localities from regulating nude dancing in those establishments?
> Whichever principle is accepted, how does it apply to the Newport nude dancing ordinance?



> (3) Aside from the abstract questions of delegation and preemption, the parties should note that the rationale of the *Bellanca* decision appears to be: "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." 452 U.S. at 717. Given the express statutory authority for cities to conduct popular elections on the question of local prohibition; *see* K.R.S. §§ 242.010-242.990, may a city in Kentucky *by ordinance* "ban the sale of alcoholic beverages entirely?"
> If not, does the Newport ordinance come within the doctrine of *Bellanca*?

In discussing these issues, the parties should discuss the relevance, if any, of the following stipulations entered into by the parties:

> A. KRS 241.190 imposes upon the City of Newport Liquor Administrator the same duties and powers with respect to city liquor licenses and the regulation thereof as possessed by the Kentucky State Board of Liquor Control as to state liquor licenses and regulations.
>
> B. The City of Newport Liquor Administrator is vested with the right to revoke a city liquor license based upon a finding of a violation of state law, state regulations adopted by the Kentucky State Board of Liquor Control, upon the City of Newport Liquor Administrator's regulations which have been adopted by the Kentucky State Board of Liquor Control, and other city ordinances or regulations, or both, including Commissioners' Ordinance No. 0-82-85.

The first issue presented by the Court for supplemental briefing was the issue of delegation of Twenty-first Amendment authority from the state to the city. The majority finds that the city can not ban the sale of liquor by ordinance but only by popular election, and, therefore, *Bellanca* is not applicable. (The Court's issue 3.) The majority, therefore, concludes that the issue of delegation need not be addressed.

The majority concludes that the City cannot exercise ". . . in part a power it does not hold in full." I find that the majority reads *Bellanca* much too narrowly. The thrust and the "doctrine" of *Bellanca* should not be limited to the one phrase "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." The trial court did not base its opinion on this limited basis.

*Bellanca*, following *California v. LaRue*, 409 U.S. 109 (1972), recognized that under the Twenty-first Amendment a state has broad power to regulate the times, places, and circumstances under which liquor may be sold. *Bellanca*, again citing *LaRue*, referred to banning nude dancing as part of a liquor license control program. *LaRue* stated the following:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *LaRue* at p. 114.

Of course, the ordinance does not ban the sale of



liquor in a precinct or in the city contrary to the provisions of Section 61 of the Kentucky Constitution and K.R.S. 242.010-242.990. The ordinance for one of its remedies provides for the revocation of the city license for an offending establishment. The City of Newport Liquor Administrator is already vested with the right to revoke a city liquor license for certain violations including city ordinances and regulations. Under the majority holding, a question arises whether or not even the state may revoke a license if it applies the relaxed standard of *LaRue*, *Bellanca* and the Twenty-first Amendment.

I do not believe that the city and possibly the state, because of the existence of the Kentucky Constitution provision and the local option statutes, is restricted where constitutional rights are asserted solely to the exercise of the police power to regulate the liquor industry.

Having considered the Court's issue 3, I now consider the remaining Court's issues.

The Court's issue 1 quoted above presents the question of whether or not there has been a valid delegation of Twenty-first Amendment authority from the State to the City of Newport. That issue is further refined as to the validity of a delegation of broad aspects of the alcoholic beverage industry or a requirement of state affirmative and explicit delegation. The majority opinion in its view felt that it need not reach this issue. I do reach this issue and find that whether or not there is a delegation is a matter of state law. The language of the Twenty-first Amendment indicates that it is a state matter and there is no overriding national issue involved in the regulation of the alcoholic beverage industry. The Twenty-first Amendment, in pertinent part, is as follows:

> Section 2. The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

See, also, *Die Burg, Inc. v. Underhill*, 465 F. Supp. 1176 (M.D.Fla. 1979), and *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976) and footnote 11 at page 1132, as follows:

> 11. In *Tally v. City of Detroit*, 54 Mich. App. 328, 220 N.W.2d 778 (Ct.App. 1974), *aff'd on rehearing* 58 Mich. App. 261, 227 N.W.2d 214 (Ct.App. 1975), the Michigan Court of Appeals affirmed the facial validity of Detroit Ordinance No. 744-G in the face of a First Amendment challenge to the licensing requirements for Group "D" Cabarets. Relying on *California v. Larue*, [sic] the Michigan Court found that the City derived its power of home rule from the state and that the ordinance in question was a reasonable exercise of Detroit's Twenty-first Amendment authority to regulate local liquor traffic. *Id.*, 220 N.W.2d at 783. *See also Crownover v. Munick*, 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497 (1974); *Manos v. City of Green Bay*, 372 F.Supp. 40 (E.D.Wis. 1974).

The next issue for consideration then is, has there been a sufficient delegation of authority by the State to the City to bring the action of city council and the ordinance in question within the doctrine of *Bellanca*.

Municipalities in Kentucky do not have inherent police power to regulate the alcoholic beverage industry and municipalities have only those powers expressly or impliedly conferred upon them. See *O'Brien v. Department of Alcoholic Beverage Control, et al.*, 206 S.W.2d 941 (Ky. Ct. App. 1947). Based on Kentucky statutes and Kentucky state judicial opinions, I find that



together the state and municipalities by authority delegated to them exercise joint control over the alcohol beverage industry. Although the City of Newport does not enjoy home rule and is a city of the second class, it does share concurrent power with the state. Thus, there is a sufficient delegation to bring the ordinance within the Twenty-first Amendment and the *Bellanca* doctrine.

While opinions are not precise as to specific delegation, there are precedents which permit Twenty-first Amendment regulation under general delegation. See, *Die Burg, Inc. v. Underhill, supra; Manos v. City of Green Bay*, 372 F. Supp. 40 (E.D. Wis. 1974); *Del Percio v. City of Daytona Beach*, 449 So.2d 323 (Fla.App.5 Dist. 1984).

As to specific statutes involved, KRS 243.070 provides in part as follows:

> The city legislative body of any city . . . may impose license fees for the privilege of manufacturing and trafficking in alcoholic beverages.

KRS 241.190 in pertinent part is as follows:

> The functions of each city administrator shall be the same with respect to city licenses and regulations, as the functions of the board with respect to state licenses and regulations, except that no regulation adopted by a city administrator may be less stringent than the statutes relating to alcoholic beverage control, or than the regulations of the board.

KRS 243.370 in pertinent part states:

> If an applicant proposes to do business in a county or city in which a county or city license is required for the manufacture, sale or transportation of alcoholic beverages, he shall be ineligible to apply for a state license unless his application for a

county or city license has first been approved by the county administrator or city administrator.

KRS 243.450 in pertinent part reads:

(1) A license . . . shall be refused:

(a) If the applicant or the premises for which the license is sought do not comply fully with all alcoholic beverage control statutes, the regulations of the board, all ordinances relative to the regulation of the manufacture, sale and transportation of alcoholic beverages, and all regulations of a city administrator or county administrator;

And KRS 243.490 reads in pertinent part as follows:

(1) Any license . . . may be revoked by the state board if the licensee shall have violated . . . any rules or regulations of any local alcoholic beverage authority or any similar body heretofore in existence. . . .

Other state statutes regulate the issuing, suspension and revocation of licenses. See KRS 243.100, KRS 243.220 and KRS 243.500.

The Kentucky legislature has also enacted certain state statutes which are directed to specific conduct, i.e. KRS 244.120 in pertinent part states:

> (1) No person licensed to sell alcoholic beverages at retail shall cause, suffer, or permit the licensed premises to be disorderly.
>
> (2) Acts which constitute disorderly premises consist of permitting patrons to cause public inconvenience, annoyance or alarm, or wantonly creating a risk through:
>
> • • •
>
> (d) Creating a hazardous or physically offensive condition by any act that serves no legitimate purpose.

See also, KRS 243.500(7).



Kentucky State judicial authorities have interpreted the above statutes and indicate a broad delegation of authority to cities. In *Deckert v. Levy*, 213 S.W.2d 431 (Ct. App. Ky. 1948), suit was brought by a state licensee to compel the board of commissioners of the city to issue him a retail beer license. The issue was whether or not a city of the second class could limit by ordinance the number of retail beer licenses in the absence of regulations of the State Alcoholic Beverage Control Board to that effect. The court held that the city had the authority to deny the license and stated the following:

> The power of the state to control and regulate the traffic in intoxicating liquor may be delegated or conferred by the Legislature upon municipalities, either in whole or in part. Even in the absence of a specific delegation, authority exists as an incident to the general powers of a city and its exercise is justified by the general welfare provisions of municipal charters, particularly in relation to the issuance of licenses and limitation on the number, *Schwierman v. Town of Highland Park*, 130 Ky. 537, 113 S.W. 507; *Christian Moerlein Brewing Co. v. Roser*, 169 Ky. 198, 183 S.W. 479.
>
> It is usual for the state to share responsibility with its subordinate units of government, particularly with cities and towns, by extending concurrent or coordinate powers. Where there is a conflict in the authority or in its exercise, the state's action has supremacy. This is recognized in the Klein and O'Brien cases above cited.
>
> General authority of cities, of the second class to regulate intoxicating liquor may be found in the provision of their charters granting power to pass and enforce ordinances "not inconsistent with the law, as are expedient in maintaining the peace,

good government, health and welfare of the city." KRS 84.150. Also, power to license business generally. KRS 84.190. Specific authority for the issuance of licenses for the privilege of trafficking in intoxicating liquor is given the several city legislative bodies by KRS 243.070. The only statutory limitations are (1) the licenses must correspond in their provisions to those issued by the state administrator and (2) on the amount of fees. There is no statutory limitation, either maximum or minimum, on the number of licenses which a city council or board of commissioners may authorize or issue.

The question we have here is whether there is any conflict between the use or exercise of powers delegated to the state board and its administrators as the state agency, on the one hand, and the use or exercise of the power delegated to the City of Newport by KRS 243.070 on the other.

*Deckert*, 213 S.W.2d at 433.

> Thus the state, through its agency, has not limited the number of licenses for the retail of malt liquors in that City. Therefore, it can not be said that the state has moved in and exercised its superior authority; hence, there is no conflict with the ordinance which limits the number. It must prevail. The action of the State Administrator in issuing a state license or permit does not make it mandatory on the city officials to violate its ordinance.

*Deckert*, 213 S.W.2d at 434.

*Deckert* was followed by the case of the *City of Bowling Green v. Gasoline Marketers*, 539 S.W.2d 281 (Sup.Ct.Ky. 1976).



The city passed an ordinance which prohibited the issuance or renewal of a beer license if the premises were used in whole or in part with the operation of any business or enterprise which had more than 50% of its gross receipts in the sale of gasoline and lubrication oil.

Licenses were denied by the city but granted by the Alcoholic Beverage Control Board. An appeal was taken by the city to the Franklin Circuit Court. That court dismissed the appeal. On appeal to the Kentucky Supreme Court, the only issue was whether the City of Bowling Green, a second class city, had authority to enact an ordinance prohibiting the issuance or renewal of retail beer licenses to gasoline stations. The court said the following at page 283:

> The limitation on the issuance of licenses to appellees is by ordinance and not by regulation of the city alcoholic beverage control administrator. The contention that the ordinance is not enforceable because it was not approved by the State Alcoholic Beverage Control Board, pursuant to the provision of K.R.S. 241.190, is without merit.

The Court referred to the case of *Deckert* and observed that in some aspects the City of Bowling Green case and the *Deckert* case had differences without a distinction. The Supreme Court went on to comment regarding the state regulations of distilled spirits or wine and the city's regulation of malt beverage as follows:

> There is no conflict between the subject ordinance and any regulation of the Kentucky Alcoholic Beverage Control Board. The city has spoken on the subject; the state has not preempted the subject. A municipal corporation possesses no powers except those expressly granted or those essential to the accomplishment of its declared ob-

jectives and purposes. Courts have no control over a city council as long as it acts within the scope of its express or necessarily implied powers, but if the council enacts ordinances without authority or contrary to the controlling laws in such matters or they are unreasonable, arbitrary, or oppressive, the courts may declare such ordinances invalid. *City of Somerset v. Newton*, 259 Ky. 195, 82 S.W.2d 306.

*City of Bowling Green*, 539 S.W.2d at 284.

The Supreme Court stated, in reference to K.R.S. 243.070, that:

> In the case at bar the city legislative body of a second class city has been given specific authority by KRS 243.070 to impose license fees for the privilege of trafficking in alcoholic beverages, and that privilege is broad enough to include the right to regulate the nature of the premises from which beer can be sold.

*City of Bowling Green*, 539 S.W.2d at 284.

The case of *Schweirman v. Town of Highland Park*, 113 S.W. 507 (Ct.App.Ky. 1908), referred to in *Deckert*, perhaps anticipated the holding in *California v. LaRue*, 409 U.S. 109 (1972), *reh'g denied*, 410 U.S. 948 (1973), and *Bellanca*, *supra*, when, in the opinion, is stated the following:

> The retail liquor business has always been placed in a class by itself, and dealt with by special laws; so that the reasons that might deny the boards the right to discriminate between persons applying for licenses to engage in any other legitimate occupation and pursuit regulated and controlled by general laws have little or no application to this business.



> Although recognized legitimate and under the protection of the law, it stands apart from other lawful occupations, and must be treated in a class by itself.

This early opinion held that the town could limit the number of licenses to be issued. It is noted that in *California v. LaRue*, *supra*, the court stated that the case came to the court, "not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink." *California*, 409 U.S. at 114.

Thus, I find, from the statutes, the authority granted to cities to license premises, and the Kentucky decisions commenting on the license authority and general powers of cities, that ordinance No. 0-82-85 is within the Twenty-first Amendment authority delegated to the City of Newport.

The majority opinion, because of the holding on delegation, did not consider the preemption and vagueness issues. Since I view the issue of delegation differently than the majority, I now present my views on the remaining issues. I find on the issue of preemption that for the state to preempt it must take affirmative action.

The cases of *City of Bowling Green v. Gasoline Marketers* and *Deckert v. Levy* are to this effect. See also, *Louisville & Nashville Railroad Company v. Commonwealth*, 488 S.W.2d 329, (Ct.App.Ky. 1972) where it is stated that:

> A conflict exists between an ordinance and a statute when the ordinance permits conduct which is prohibited by statute or prohibits conduct which is permitted by the statute.

The State of Kentucky has regulated certain conduct, KRS 244.120 for example, proscribes disorderly conduct.

It cannot be concluded, however, that the denial of one type of conduct is authority to engage in another, i.e. nude dancing in a licensed establishment.

I find that in order for the state to preempt local regulation of nude dancing in establishments serving alcoholic beverages it must explicitly and affirmatively prohibit localities from regulating nude dancing.

As to appellants' issue one which was first briefed and argued by the parties, the majority use the *strict standard* to review an infringement on a protected liberty interest. As to those protected interests, the majority notes the limited record below. The record was, of course, primarily by stipulation. The majority would require more.

In their brief, appellants assert that the ordinance restrains appellants' First and Fourteenth Amendment rights of free expression, association and assembly and that it presents a clash between these amendments and the Twenty-first Amendment to the Constitution.

Appellees maintain that the ordinance is not an attempt to ban nude or nearly nude dancing as a form of obscenity but is an attempt to regulate the business of selling intoxicating liquor, asserting that such authority stems from the traditional police power and the Twenty-first Amendment.

Since I disagree with the majority that the Twenty-first Amendment authority is eliminated from the case by reason of the local prohibition statutes, I cite the following. In the case of *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Supreme Court recognized that nudity and/or its depiction may be protected as constitutional expression. But the scope of the foregoing decisions was limited by the fact that the ordinances involved prohibited nudity and/or its depiction not just in



bars but "any public place." See *New York State Liquor Authority v. Bellanca*, *supra*.

In *California v. LaRue*, *supra*, the Supreme Court said that states have broad latitude under the Twenty-first Amendment to control the manner and circumstances under which liquor may be dispensed and the conclusion that sale of liquor by the drink and lewd and naked entertainment should not take place simultaneously in licensed establishments was not irrational nor was the prophylactic solution unreasonable.

The Supreme Court went on to hold that:

> While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

*Id.* at 118.

The Court held that the police power of the state was strengthened by the Twenty-first Amendment and its relationship to other amendments.

In my opinion, references to a "state" in the case sub judice are applicable to the City of Newport.

This Court speaking through Judge Celebrezze in *Felix v. Young*, 536 F.2d 1126, 1132 (6th Cir. 1976) in regard to the enforcement of ordinances regulating the location of certain businesses providing adult entertainment commented on *California v. LaRue*, *supra*, as follows:

> In *California v. Larue* [sic] the Supreme Court recognized that the broad power of the states to

regulate the sale of liquor may outweigh any First Amendment interest in nude dancing. A state may promulgate broad prophylactic rules banning sexually explicit entertainment at licensed bars and cabarets so long as the regulations represent a reasonable exercise of a state's Twenty-first Amendment authority and are rationally related to the furtherance of legitimate state interests. However, if the state's authority to control liquor traffic is not implicated in a regulatory plan which impinges on free expression, the regulation must withstand stricter scrutiny. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

We find that the Detroit ordinance establishing licensing requirements for Group "D" Cabarets was enacted by authority of the Twenty-first Amendment and *so the relaxed standard of review in California v. Larue* [sic] *is applicable. Accord, Paladino v. Omaha*, 471 F.2d 812, 814 (8th Cir. 1972). (Emphasis added.)

As noted by the district court, the parties readily admit that the nude dancing ordinance is practically a verbatim copy of the statute upheld in *Bellanca*. In *Bellanca*, 452 U.S. at 715-16, the Supreme Court stated the following:

> The Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. In *California v. LaRue*, 409 U.S. 109 (1972), we upheld the facial constitutionality of a statute prohibiting acts of "gross sexuality," including the display of the genitals and live or filmed performances of sexual acts, in establishments licensed by the State to serve liquor. Although we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor.
>
> In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), we considered a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars, but "any public place." Though we concluded that the District Court had not abused its discretion in granting a preliminary injunction against enforcement of the ordinance, that decision does not limit our holding in *LaRue*. First, because *Doran* arose in the context of a preliminary injunction, we limited our standard of review to whether the District Court abused its discretion in concluding that plaintiffs were *likely* to prevail on the merits of their claim, not whether the ordinance actually violated the First Amendment. Thus, the decision may not be considered a "final judicial decision based on the actual merits of the controversy." *University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). Second, the ordinance was far broader than the ordinance involved either in *LaRue* or here, since it proscribed conduct at "any public place," a term that "could include the theater, town hall, opera place, as well as a public market place, street or any place of assembly, indoors or outdoors.' " 422 U.S., at 933

(quoting *Salem Inn, Inc. v. Frank*, 364 F.Supp. 478, 483 (EDNY 1973)). Here, in contrast, the State has not attempted to ban topless dancing in "any public place": As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor. Indeed, we explicitly recognized in *Doran* that a more narrowly drawn statute would survive judicial scrutiny . . .

Thereafter, the Court concluded, as quoted at page 9a of the majority opinion, that the power to ban the sale of alcoholic beverages included the lesser power to ban topless dancing where liquor was sold. I find that the ordinance is within the *Bellanca* doctrine and not subject to the strict standard of review.

The majority, because of its holding as to the *Bellanca* doctrine, did not address the vagueness issue. Since I differ as to the applicability of *Bellanca*, I express my view on this issue. Appellants assert that the ordinance is vague and overbroad on its face or as applied, primarily with reference to the word "simulation." Appellants suggest that the vagueness of "simulation" could involve patrons in tight fitting or revealing attire. As appellees correctly point out, the language of the ordinance and the inclusion of the word "simulation" was approved by the Supreme Court on *Bellanca*. Men of common intelligence do not have to guess at its meaning. See *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

The majority opinion holds that the ordinance does not constitute an impermissible prior restraint, and, with this finding, I concur. I would also hold that this is not an obscenity case, but a liquor regulation case following the teachings of *LaRue* and *Bellanca*.

For the foregoing reasons, I would affirm the trial court as to the judgment on both ordinances.



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 85-5471

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NICHOLAS A. IACOBUCCI,
d/b/a TALK OF THE TOWN, et al.,
Plaintiffs-Appellants,

v.

THE CITY OF NEWPORT, KENTUCKY, et al.,
Defendants-Appellees.

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JUDGMENT
(Filed March 20, 1986)

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, and the case is remanded in part consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

Issued as Mandate: 5/19/86
COSTS: none

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 85-5471

---

NICHOLAS A. IACOBUCCI,
d/b/a TALK OF THE TOWN, ET AL.,
Plaintiffs-Appellants,

v.

THE CITY OF NEWPORT, KENTUCKY, ET AL.,
Defendants-Appellees.

---

**ORDER**
(Filed May 9, 1986)

BEFORE: KEITH and MARTIN, Circuit Judges, and POTTER*, United States District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. John W. Potter sitting by designation from the Northern District of Ohio.



Judge Potter would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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CIVIL ACTION NO. 82-145

---

NICHOLAS A. IACOBUCCI,
d/b/a TALK OF THE TOWN, ET AL.
PLAINTIFFS

VS.

THE CITY OF NEWPORT, KENTUCKY, ET AL.
DEFENDANTS

---

**JUDGMENT**
(Filed June 8, 1983)

For reasons stated in the opinion filed concurrently herewith,

IT IS ORDERED AND ADJUDGED that both ordinances must be upheld and the complaint, and it is, hereby dismissed with prejudice.

This 8th day of June, 1983.

/s/ WILLIAM A. BERTELSMAN
JUDGE



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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CIVIL ACTION NO. 82-145

---

NICHOLAS A. IACOBUCCI,
d/b/a TALK OF THE TOWN, ET AL.
PLAINTIFFS

VS.

THE CITY OF NEWPORT, KENTUCKY, ET AL.
DEFENDANTS

---

**OPINION**
(Filed June 8, 1983)

This case is before the court for a final ruling on the right of the City of Newport, Kentucky, to prohibit nude or nearly nude dancing in establishments selling liquor by the drink. Also challenged is an ordinance requiring employees of establishments selling liquor by the drink to register with the police department and to procure an identification card and be fingerprinted. The ordinance further requires employees to have the identification card in their possession during working hours.

## FACTS

The two measures briefly described above were enacted by the City Commission of Newport, Kentucky, in June and October of 1982. Commissioner's Ordinance No. 0-82-56 (hereinafter the fingerprinting ordinance) became effective on June 10, 1982. The fingerprinting ordinance provides in part:

"1. Any person employed in any capacity in any establishment or place of business, except as hereinafter provided, where liquor or beer is sold or dispensed by the drink as defined in both the Kentucky Revised Statutes and the Newport City Ordinances, shall register in a book of registration to be kept by the Newport Police Department, and is hereby required to be fingerprinted or photographed by the Police Department of the City of Newport within five (5) days from the time or his or her employment. No such person shall fail to register, be fingerprinted or photographed.

"2. No employer, whether a person, firm or corporation, shall allow any person to remain in such employment longer than five (5) days unless within such five (5) day period, the employee shall have registered and shall have been fingerprinted and photographed.

"3. The registrants are required to have in their possession the identification cards issued by the Newport Police Department on their persons during their hours of employment in establishments selling or dispensing liquor or beer by the drink."

Commissioner's Ordinance No. 0-82-85 (hereinafter the nude dancing ordinance) became effective on October 1, 1982. The crucial portion of this somewhat lengthy ordinance provides:

"It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any



female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof."

The preamble to the nude dancing ordinance declares the measure is a response to the City Commission's determination that nude entertainment in liquor establishments is "injurious" to the city's citizens. The preamble then lists the purposes sought to be accomplished by the ordinance. These include protection of property values, prevention of the deterioration of the city's neighborhoods, promotion of a climate attractive to business investors, enhancement of the quality of life and decreasing the incidence of crime and juvenile delinquency.

A person who twice violates the nude dancing ordinance by exposing to view the anatomical areas designated therein may be charged with a misdemeanor. A proprietor of a liquor establishment who knowingly permits the proscribed activity to occur on his premises may, after notice and a hearing, have both his occupational license and liquor license revoked.

The plaintiffs in this case, Nicholas A. Iacobucci, Ray Thomas Sexton, Thomas Ray Chambers, Raymond W. Chambes and Robert J. Peterson, are proprietors of liquor establishments in Newport that prior to the adoption of the ordinance offered entertainment in the form of nude or nearly nude dancing. The defendants are the City of Newport, its City Commission, and the city Manager, Solicitor, Liquor Administrator and Police Department.

On September 30, 1982, the day preceding the effective date of the nude dancing ordinance, the plaintiffs filed a complaint attacking both ordinances as un-

constitutional and seeking to enjoin their enforcement. At the same time, the plaintiffs applied for a temporary restraining order. An evidentiary hearing was held on the motion on October 7, 1983, resulting in denial. The parties agreed that after they had filed further memoranda concerning whether a permanent injunction should be granted and engaged in oral argument, the court would take the matter under submission. Oral argument was heard on April 29, 1983.

## ANALYSIS

### A. The Nude Dancing Ordinance.

It is clear and readily admitted by the parties that the nude dancing ordinance is based practically verbatim on the statute upheld by the Supreme Court of the United States in *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981). The statute involved in that case provided:

> "No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof." *Id.* at 714 n.1.

The similarity of the *Bellanca* statute and the ordinance in the instant case is readily apparent. Indeed, the *Bellanca* is more restrictive than the Newport ordinance.



The Supreme Court of the United States in passing on the *Bellanca* statute relied on the Twenty-first Amendment of the Constitution of the United States, which provides in relevant part:

> "The transportation or importation into any State, Territory, of possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This amendment has been interpreted by the Court to confer upon a state the power "to regulate the sale of liquor within its boundaries." *Id.* at 715. Expanding further upon this theme, the Court stated in *Bellanca*:

> "This Court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold. In *California* v. *LaRue*, 409 U.S. 109 (1972), we upheld the facial constitutionality of a statute prohibiting acts of 'gross sexuality,' including the display of the genitals and live or filmed performance of sexual acts, in establishments licensed by the State to serve liquor. Although we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor." *Id.* at 715-16 (citations omitted).

This court need not reach the question whether, if the type of dancing described in the Newport ordinance

were prohibited in establishments not selling alcoholic beverages, it would be worthy of constitutional protection. This court holds that the nude dancing ordinance is squarely within the doctrine of *Bellanca*, *supra*, and must be upheld on that basis.

The plaintiffs argue that the Supreme Court in *Bellanca* did not address certain First Amendment issues, especially the issue of prior restraint, and that, since *Bellanca* is a *per curiam* opinion, this court has leeway to strike down the Newport ordinance as a prior restraint. Even a cursory examination of the authorities reveals that the prior restraint doctrine is totally inapplicable to this case.

The term "prior restraint" generally refers to a system of unreviewable administrative or judicial censorship. Such a system endows a judicial or administrative official with discretion, largely uncontrolled by intelligible standards, to approve various acts of expression on a piecemeal basis. This is made quite clear by the case on which plaintiffs rely most heavily, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 552 (1975). In that case, the producers of the musical, "Hair," were denied the right to perform the production in a municipal auditorium. Without extending this opinion by a detailed discussion of the Court's analysis in that case, it may be noted that the municipal board's decision made "in the best interests of the community," was found to impose an unlawful prior restraint because of the unfettered discretion residing in the board to deny use of the forum in advance of the expression.

Further discussion by the Court demonstates that the doctrine of prior restraint is concerned, as we have said, with a system of censorship involving judicial or administrative appraisal of discrete instances of speech. 420 U.S. at 554-55. *See Bantam Books* v. *Sullivan*, 272



U.S. 58 (1963); *Freedman* v. *Maryland*, 38 U.S. 51 (1965); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); *Bernard* v. *Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980).

The difference between prior restraints and the restraint imposed in the present case becomes apparent when the dangers of prior, as opposed to subsequent, restraints are addressed. A very succinct explanation was offered by the District of Columbia Circuit in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979):

> "An administrative censorship scheme provides less protection for expression than a system of subsequent punishment because it permits sanctions to be imposed for failure to obtain the censor's approval, regardless of the nature of the expression. Expression may be punished in a censorship scheme upon proof of one fact — the failure to obtain prior approval. A would-be speaker thus cannot ignore the censor, for later he will be unable to defend his expression on the ground that it posed no danger and therefore the censor could not have suppressed it consistent with the First Amendment. . . . In contrast, under a system of subsequent punishment, the state must show in each case that the particular expression which the state seeks to punish did in fact pose an immediate threat to an interest which the state has a right to protect." *Id.* at 184 n.15 (citations omitted).

It is the opinion of this court that the reason the doctrine of prior restraints was not discussed in *Bellanca*, *supra*, was because of the obvious inapplicability of that doctrine to the statute there before the court. For identical reasons, the doctrine is inapplicable to the ordinance before this court. That ordinance grants no

power to anyone to appraise the forbidden activity, but in meticulous detail spells out that which is proscribed. If dancing at an establishment which serves liquor falls within the detailed criteria, it is prohibited; no official, administrative or judicial, has any authority to make an exception. Further, the ordinance provides for no injunction against such dancing, or for any means by which it must be approved before it is presented, but merely for a penalty to be imposed *after* it has occurred in establishments subject to the prohibition.

At one time, plaintiffs also made an equal protection attack on this ordinance. The equal protection doctrine comes into play when governmental regulation treats one group differently than another. Unless such regulation burdens fundamental constitutional rights or suggests prejudice against racial or other minorities, the relation between the means and ends of the regulation is only required to be reasonable. Where fundamental rights or minority prejudice is involved, however, the regulation is subjected to close analysis. The legislation must serve more than a legitimate public purpose; there must be a compelling need for it. *See Plyler* v. *Doe*, 50 U.S.S.W. 4650 (1982).

The equal protection doctrine was not discussed in *Bellanca, supra*. The court believes this is because the Supreme Court assumed the state had valid reasons to regulate "adult" activity in establishments serving liquor. If the situation is regarded as one involving merely economic regulation and not implicating a fundamental right, there is an obvious rational basis for imposing extra regulations on liquor establishments. Particularly this is true of regulations pertaining to establishments where sexual instincts are apt to be aroused. Many activities needful of supervision by the state are prone to occur where the elements of liquor and sex are combined. These activities can include sexual solicitation, robbery, blackmail, child and homosexual prostitution, and a variety of other transactions the state has not only the right but the duty to regulate.



For the same reasons, the court has no hesitation in holding that, from an equal protection standpoint, the city has a compelling interest justifying regulation in such matters. This is especially true of the City of Newport. A reform commission, which was elected on a platform of cleaning up the long-tarnished image of the city, passed this ordinance as a part of its program of improvements designed to make the community a decent place for citizens to live and work. The preamble to the nude dancing ordinance clearly spells out this purpose. In light of the history of Newport, the court again has no hesitation in holding that under the peculiar circumstances there existing, a compelling interest exists justifying the regulatory restrictions imposed by the ordinance in question. The Supreme Court has deemed such interests to be quite significant: "[T]he City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 49 (1976) (upholding city legislation restricting the locations where adult entertainment films could be exhibited).

**B. The Fingerprinting Ordinance.**

The plaintiffs attack the second ordinance on the ground that it is an invasion of the right of privacy of the employees of the establishments involved. Without doubt, there exists a constitutional right of privacy. *See*

*Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1924); *Meyer v. Nebraska*, 262 (U.S. 390 (1922). This court has held that the right of privacy may be protected under both the due process clause of the Fourteenth Amendment and under the Ninth Amendment. *See, e.g., Petrey v. Flaugher*, 505 F.Supp. 1087 (E.D. Ky. 1980); *Bahr v. Jenkins*, 538 F.Supp. 483 (E.D. Ky. 1982).

It is also true without doubt that there is a substantive due process right to follow an occupation of one's choice without unreasonable governmental interference. *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983). However, a moment's reflection indicates that no one is deprived of his right to follow the livelihood of his choosing by this ordinance. No restrictions are placed on who may be employed in establishments serving liquor. All that is required is that the employees of such establishments register with the police department and be fingerprinted.

Because of the propensity of such establishments to be unusually susceptible to illegal activity or activity requiring close regulation, and considering the history of the City of Newport as discussed above, it is obvious to the court that no matter which provision of the Constitution is considered, this ordinance must be upheld.

As has already been stated, under the equal protection clause, no fundamental right or invidious discrimination is involved. Persons may be required to be fingerprinted and photographed in connection with a variety of occupations, in both federal government and private employment. Persons are required to be photographed, give their names and addresses and carry an identification card as a condition of driving a car, which in modern society might be considered a fundamental



right. Therefore, the court holds that the mere requirement of registering with the city as a condition of employment in a tavern or bar does not implicate a fundamental right. Certainly there is a rational basis for such a requirement because of the need for regulation of such establishments as previously explained.

Although such a holding is not necessary, to facilitate appellate review, the court also holds, in light of the particular history of the City of Newport, as discussed above, there exists a compelling state interest justifying this regulation.

## CONCLUSION

For the reason stated above, the court concludes and holds that both ordinances must be upheld and the complaint dismissed. A separate judgment to that effect is entered concurrently herewith.

This 8th day of June, 1983.

/s/ WILLIAM C. BERTELSMAN
JUDGE

## ORDINANCE NO. 0-82-85

AN ORDINANCE OF THE CITY OF NEWPORT, KENTUCKY, PROHIBITING NUDE OR NEARLY NUDE ACTIVITIES IN ESTABLISHMENTS WITH A RETAIL DRINK LIQUOR LICENSE AND/OR RETAIL CEREAL MALT BEVERAGE LIQUOR LICENSE, AND PROVIDING FOR PENALTIES FOR VIOLATION THEREOF, INCLUDING THE SUSPENSION OR REVOCATION OF THE SAID RETAIL LIQUOR DRINK LICENSE AND/OR RETAIL CEREAL MALT BEVERAGE LIQUOR LICENSE AND THE REVOCATION OF THE ESTABLISHMENT'S OCCUPATIONAL LICENSE.

WHEREAS, numerous business establishments with a retail drink liquor license and/or retail cereal malt beverage liquor license from the City of Newport, Kentucky, provide adult entertainment for its patrons, such as nude or nearly nude dancing; and

WHEREAS, the City Commision of the City of Newport, Kentucky, determines such conduct or activities as injurious to the citizens of the City of Newport, Kentucky; and

WHEREAS, the City Commission of the City of Newport, Kentucky, believes that this Ordinance is necessary:

1. To protect property values;

2. To prevent blight and the deterioration of the City's neighborhoods;

3. To promote a climate conducive to a return of residences and businesses to the City's neighborhoods;

4. To enhance the quality of life within the City;

5. To presume and stabilize the City's neighborhoods; and



6. To decrease the incidence of crime, disorderly conduct and juvenile delinquency, now Therefore,

BE IT ORDAINED BY THE CITY OF NEWPORT, KENTUCKY:

### SECTION I

### DEFINITIONS:

A. "Business Establishments"—Shall mean a business within the City of Newport, Kentucky, where liquor, beer and/or wine is sold for consumption on the premises pursuant to a retail drink liquor license and/or retail cereal malt beverage liquor license that has been issued by the City of Newport, Kentucky.

B. "Liquor Administrator"—Shall mean the duly appointed Alcoholic Beverage Control Administrator of the City of Newport, Kentucky.

C. "Licensee"—Shall mean any person to whom a retail drink liquor license or a retail cereal malt beverage liquor license has been issued by the City of Newport, Kentucky, including the officers and agents of the licensee.

D. "License"—Shall mean a retail drink liquor license or a retail cereal malt beverage liquor license issued by the City of Newport, Kentucky.

E. "Occupation License"—Shall mean the occupational license issued for the business establishment pursuant to the City of Newport, Kentucky's Occupational License Ordinance.

F. "Person"—Shall mean a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental authority.

G. "Premises"—Shall mean the land and building in

and upon which any business establishment regulated by alcoholic beverage statutes is carried on.

H. "Retail Licensee"—Shall mean any licensee including its officer and agents, who sells at retail any alcoholic beverage for the sale of which an occupational license is required.

## SECTION II

It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof.

## SECTION III

A license or retail licensee is guilty of permitting nude or nearly nude activity when having control of the business establishment's premises which it knows or has reasonable cause to know, is being used by any person to appear on the premises in such manner or attire as to expose to view portions of the pubic area, anus, vulva or genitals, or any simulation thereof; or used by any female to appear on the premises in such manner or attire as to expose to view any portion of the breast referred to as the areola, nipple, or any simulation thereof, it permits such activity or fails to make reasonable and timely effort to halt or abate such activity or use.

## SECTION IV

A. Performing nude or nearly nude activities as set



forth in Section II or permitting such activities as set forth in Section III is a Violation and punishment shall be fixed as set forth in the Kentucky Revised Statutes.

B. The second violation of Section II or Section III above within a twelve month period shall constitute a Class B Misdemeanor with punishment as set forth in the Kentucky Revised Statutes.

C. Three or more violations of Section II or Section III within a twelve month period shall constitute a Class A Misdemeanor with punishment as set forth in the Kentucky Revised Statutes.

## SECTION V

A. In the event that a violation of Section II and/or III of this Ordinance occurs, the City of Newport Liquor Administrator shall forthwith conduct a hearing pursuant to KRS 243.520 (in conjunction with 241.160 and 241.190), to determine whether the liquor license, at whose business establishment the activity prohibited by this Ordinance occurred, shall have his/her or its license suspended or revoked.

B. In the event three or more violations of Section II and/or III above occur at a business establishment within a twelve month period, the Liquor Administrator, after a hearing, shall revoke the said retail drink license or retail cereal malt beverage liquor license or both.

## SECTION VI

A. In the event that a violation of Section II or III above occurs, the City Manager shall prefer charges against the retail license pursuant to the Newport Code of Ordinances, sections 26-45 et seq. and after notice, a

hearing etc. held by the Board of Commissioners, the occupational license shall either be revoked or suspended.

B. In the event that three or more violations of Section II or III above occur at a business establishment within a twelve month period, after notice and hearing etc. pursuant to the Newport Code of Ordinances sections 26-45 et seq., the Board of Commissioners shall revoke the occupational license of the retail licensee.

## SECTION VII

If any provision of this ordinance, or the application thereof, is held invalid, such invalidity shall not affect other provisions or other applications of this Ordinance which can be given effect without the invalid provisions or applications, and to this end, the provisions of the Ordinance are declared to be severable.

## SECTION VIII

This Ordinance shall be in full force and effect on October 1, 1982.

## SECTION IX

This Ordinance shall be signed by the Mayor, attested by the City Clerk, recorded and published in full.

PASSED: On First Reading — 9-13-82

PASSED: On Second Reading — 9-20-82

/s/ IRENE DEATON
MAYOR



ATTEST:

/s/ FRANK PELUSO
CITY CLERK

PUBLISHED: In Full in the Campbell County Recorder, the 23 day of September, 1982.

# OPPOSITION

# BRIEF

## QUESTIONS PRESENTED

1. Is the decision of the United States Supreme Court in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), applicable only to situations when a state or its political subdivisions may by direct legislation totally ban the sale of alcoholic beverages?

2. Is the City of Newport Ordinance, Commissioners Ordinance 0-82-85, void for vagueness because of the use of the word simulation in the ordinance?

3. Has the Commonwealth of Kentucky sufficiently delegated its authority under the Twenty-first Amendment to the United States Constitution to municipalities in Kentucky to enable cities in Kentucky to adopt a ban on nudity in business establishments licensed to sell alcohol?

## PARTIES

The petitioners in this action are the City of Newport, Kentucky, its Board of Commissioners at the time the Ordinance was adopted, namely, Irene Deaton, Laura Bradley, Steve Goetz, Tom Ferrara and Fred Osburg, former City Manager, Ralph Mussman, former City Solicitor, Wil Schroder and Mike Whitehead, Liquor Administrator. The respondents are owners and/or managing agents of various establishments in Newport licensed to sell alcohol, namely, Nicholas A. Iacobucci, Ray Thomas Sexton, Thomas Ray Chambers, Raymond W. Chambers, Roger J. Petersen, 924 Inc., Tom Chambers, Inc. and Bral, Inc.



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No. 86-139

—o—

In The

# Supreme Court of the United States

October Term, 1986

—o—

CITY OF NEWPORT, KENTUCKY, *et al.*,

*Petitioners,*

vs.

NICHOLAS A. IACOBUCCI, *et al.*,

*Respondents.*

—o—

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

—o—

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

—o—

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 785 F.2d 1354 and is set forth in the appendix of the Petition for a Writ of Certiorari at pages 1a through 40a. The judgment and opinion of the

United States District Court for the Eastern District of Kentucky is unreported and is set forth in the Petition at pages 44a through 55a.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1986. A petition for rehearing en banc and for rehearing was denied on May 9, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATEMENT

This action was presented in the District Court by respondents challenging the constitutional sufficiency of two city of Newport ordinances: Ordinance No. 0-82-85, the nude dancing ban; and Ordinance No. 0-82-56, the fingerprinting ordinance. The action sought a declaratory judgment of the constitutional repugnancy and injunctive restraint of the two ordinances pursuant to 42 U.S.C. § 1983, in which the jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343. The District Court found both ordinances to be constitutionally sufficient and dismissed the complaint.

Respondents are owners and managing operators of establishments located in Newport, Kentucky who hold licenses issued by the state of Kentucky and the city of Newport for the on-premises consumption of alcoholic beverages. Respondents offer live entertainment to their



adult patrons. Prior to the enactment of the nude dancing ban ordinance, respondents offered nude dancing as the form of entertainment.

The fingerprinting ordinance was found to be constitutionally sufficient by the Court of Appeals and that issue is no longer a consideration for appellate review.

The Court of Appeals reversed and remanded the issue of the constitutional repugnancy of the nude dancing ban ordinance, holding that the authority of *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), had no application to the facts of the case *sub judice*.

The Twenty-first Amendment implication has no application, and thus the rationale of *Bellanca* is inopposite on the basis that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs" does not apply to this case. 452 U.S., at 717. The rationale of the Court of Appeals was that Section 61 of the Constitution of the Commonwealth of Kentucky, and the power flowing from the Constitution to the legislature to enact K.R.S. §§ 242.010 through 242.990, vests the power derived from the Twenty-first Amendment of the Constitution of the United States to the citizen to determine the nature of alcoholic beverage sales through general election. Thus, the power to ban the sale of alcoholic beverages entirely rests exclusively with the citizen by the Kentucky Constitution and thus the included lesser power to ban the sale of liquor on premises where nude dancing occurs rest only with the citizen—not the city council—through general election in the state of Kentucky.

The Court of Appeals properly remanded the cause for further proceedings before the District Court to determine the applicability *vel non* of the petitioners' appropriate exercise of its police powers, including evidence in support thereof, and the challenge to the subject ordinance on the grounds of vagueness and, by implication, overbreadth.

## REASONS FOR DENYING THE WRIT

The Court of Appeals' decision is this cause correctly interprets the past decisions of this Court and correctly applies the Twenty-first Amendment of the Constitution of the United States as that amendment vests power to the Commonwealth of Kentucky to regulate the alcoholic beverage industry in Kentucky through the Constitution of Kentucky which vests the power derived from the Twenty-first Amendment to the citizen of Kentucky to determine the mode and manner of liquor regulation.

### I. THE SIXTH CIRCUIT'S DECISION IN THIS CASE CORRECTLY INTERPRETES PAST DECISIONS OF THIS COURT.

The issue in this case is not the similarity of the subject ordinance to the statute present in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). The issue, as correctly interpreted by the Court of Appeals, is that the rationale of *Bellanca* and *California v. Larue*, 409 U.S. 109 (1972), is the Twenty-first Amendment of the Constitution of the United States grants to the states the power to regulate alcoholic beverages within their respective jurisdiction. Kentucky, contrary to the states of New York and California, accepted the power granted to it by the Twenty-first Amendment and by its state Constitution vested that power to the people of the state to determine within the political division and political subdivisions of the state the nature, mode and manner of liquir regulation. If the citizens of Newport, Kentucky voted to ban nude dancing within the city and thereby empowered the city council to enact appropriate legislation for enforcement, then the factual circumstances might be comparable to *Bellanca* and *Larue*.



Petitioners misplace the power to prohibit and thus regulate the sale of alcoholic beverages within Kentucky and its political subdivisions, as that power is granted to the state. Kentucky, upon reception of the power granted, did not hold to itself the power to prohibit and the implied power to regulate, but, rather, presented that power to the citizens of its state to decide. Critically absent in the instant case is the right of the people of Newport, Kentucky to decide for themselves the issue of nude dancing through election. That distinction makes all the difference, and in that difference removes the application of *New York State Liquor Authority v. Bellanca, supra.*

### II. THE SIXTH CIRCUIT'S DECISION IN THIS CASE ACCEPTS AND CORRECTLY APPLIES THE KENTUCKY STATUTORY SCHEME FOR THE REGULATION OF THE SALE OF ALCOHOLIC BEVERAGE WITH DUE REGARD FOR THE KENTUCKY CONSTITUTIONAL IMPLICATIONS.

Petitioners misread the Court of Appeals decision. Reliance upon that Court's statement: "[a] city cannot

exercise in part a power that it does not hold in full, . . . (App. 9a)''; is a misinterpretation of that Court's rationale.

Petitioners in reciting K.R.S. §§ 241.160, 241.190, 243.070, and 243.370, and K.R.S. Chapters 241 to 244, inclusive, fails to establish that the state or a city in Kentucky is granted the power to regulate nude entertainment in a liquor licensed premises. Kentucky and its political subdivisions, except the city of Newport, have carefully excluded First Amendment implications in any attempt to regulate—absent citizen approval through the ballot box—entertainment in a licensed premises.

Newport, Kentucky is a city of the second class. Only cities of the first class are granted home rule by K.R.S. § 83.410. Cf. K.R.S. Chapters 83A and 84.

Cities of the second class in Kentucky are delegated the power from the state legislative body to enact ordinances for the levying and collection of taxes; payment of the debts and expenses of the city; and other powers. K.R.S. § 84.150. A city of the second class may enact ordinances to license, tax and regulate trades, occupations and professions; to regulate and suppress a number of endeavors; none of which include an establishment selling alcoholic beverages and providing entertainment. K.R.S. § 84.190. A city of the second class may by ordinance suppress disorderly houses, houses of prostitution, prize fights, animal fights, gambling houses and lotteries. K.R.S. § 84.250; but repealed effective July 15, 1980; none of which pertain to the entertainment in issue here.



K.R.S. Chapter 241 provides for the control of alcoholic beverages. K.R.S. Chapter 242 concerns itself solely with the manner of providing elections upon a local level to permit the citizen to determine the issue of the distribution of alcoholic beverages within their respective communities. K.R.S. Chapter 243 concerns the licensing and taxing of the distribution of intoxicating beverages. Nowhere in the aforestated statutory schemes is their either prohibition or regulation of entertainment on a licensed premises.

K.R.S. § 243.490 provides that a liquor license may be revoked if the licensee has violated any provision of K.R.S. Chapters 241, 243 or 244; any regulation of the state board or department of revenue; any act of Congress or any regulation of a federal board; or any ordinance regulating the manufacture, sale and transportation of intoxicating liquors or any regulation of a local alcoholic beverage control authority. K.R.S. § 243.500 provides for the revocation or suspension of a liquor license, in which the closest that one comes to a violation similar in kind to entertainment on the premises is the prohibiting of gambling as proscribed by K.R.S. § 243.500(7). Nude entertainment is not the subject of any statutory prohibition in the state of Kentucky, and specifically it is absent from the aforestated statutory schemes.

K.R.S. Chapter 244 sets forth the regulatory aspects of Kentucky's liquor control, dealing with the sales of alcohol to minors and other regulations, but the statutory scheme does not regulate entertainment on premises licensed to sell intoxicating beverages. K.R.S. § 244.120 provides that no licensee shall cause or permit a licensed

premises to be disorderly, defined as permitting patrons to cause public inconvenience, annoyance or alarm, or wantonly creating a risk through: engaging in fighting or threatening behavior; making unreasonable noises; refusing to obey an official order to disperse; or creating a hazardous or physically offensive condition by any act that serves no legitimate purpose. K.R.S. Chapter 244 does not regulate entertainment performed on a licensed premises.

"It is a well-settled principle that municipalities have such powers and only such powers as are given by express statute or by necessary implication." *Commonwealth v. Day*, 287 Ky. 176, 152 S.W.2d 597, 599 (Ky., 1941). Furthermore, "[a] municipal corporation possesses no powers except those expressly granted or those essential to the accomplishment of its declared objectives and purposes." *City of Bowling Green v. Gasoline Marketers*, 539 S.W.2d 281, 284 (Ky., 1976).

The issue of delegation of powers from the state to its political subdivision, the city, was not an issue addressed and determined by the Court of Appeals. Furthermore, the state itself does not possess power to regulate entertainment in a liquor-controlled premises and no statute is present in the Kentucky Revised Statutes governing such regulation. Thus, under either consideration there is no issue present here as to delegation of powers from state to city.

The Kentucky statutory schemes vested to the Kentucky legislature by the people of Kentucky through the Kentucky Constitution provide for a degree of liquor regulation, but those schemes, and absent popular election for guidance, Kentucky has carefully excluded the regulation of First Amendment protected entertainment through the guise of liquor control. Live nude entertainment is subject to the protection of the First and Fourteenth Amendment of the Constitution of the United States. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).



The issue here is not whether Kentucky and its cities may regulate liquor sales, but is whether Kentucky and its cities, specifically Newport, can in the face of the Kentucky Constitution ban nude dancing absent the consideration of the Newport citizen through election. That issue was properly determined by the Court of Appeals: absent the people granting the power to the city by majority vote at an election, the petitioners cannot ban nude dancing in a liquor-licensed premises by its ordinance lacking the approval of the citizen through election.

## CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit is correct, and its remand to the District Court for further proceedings affords the petitioners the opportunity to establish that the ordinance is constitutionally sound, if the petitioners can do so. In reality, the subject ordinance regulates and prohibits nude dancing as entertainment in which the regulation of the sales of alcoholic beverages is secondary.

The Petition for a Writ of Certiorarti should be denied.

Respectfully submitted,

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*Attorney for Respondents*

# REPLY

# BRIEF

No. 86-139

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CITY OF NEWPORT, KENTUCKY, ET AL.,
Petitioners,

vs.

NICHOLAS A. IACOBUCCI, ET AL.
Respondents.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## REPLY BRIEF OF PETITIONERS

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No. 86-139

IN THE

# SUPREME COURT OF THE UNITED STATES

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CITY OF NEWPORT, KENTUCKY, ET AL.,
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vs.

NICHOLAS A. IACOBUCCI, ET AL.
Respondents.

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## REPLY BRIEF OF PETITIONERS

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The Petitioners respectfully submit this Reply Brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. This Reply Brief is specifically designed to correct any ambiguities created by the respondents' brief in opposition to the petition for certiorari, as to the authority of voters in Newport or the Commonwealth of Kentucky, to regulate nudity in establishments licensed to sell liquor.

## ARGUMENT

**VOTERS IN KENTUCKY DO NOT HAVE THE RIGHT TO DETERMINE THE ISSUE OF WHETHER OR NOT NUDITY SHOULD BE BANNED IN ESTABLISHMENTS LICENSED TO SELL LIQUOR, AS THE ELECTORATES ONLY STATUTORY RIGHT IS TO DETERMINE WHETHER OR NOT ALCOHOL SHOULD BE SOLD AT ALL.**

Respondents, in their brief in response to the petition for a writ of certiorari, state that the voters in the City of Newport have the right to determine whether or not nudity should be banned in places licensed to sell alcohol. Respondents' statement, as to the authority of the voters in Newport, does not represent the applicable law in Kentucky. The right of the voters pursuant to Section 61 of the Kentucky Constitution and Chapter 242 of the Kentucky Revised Statutes, is limited solely to whether or not alcoholic beverages should be sold at all. The voters do not have the direct authority, once the sale of alcohol is permitted, to determine the manner of regulation. Only in certain specified instances do voters in Kentucky have the right to determine public policy through initiative or referendum, except indirectly through the election of public officials. *Jacober* v. *Board of Commissioners of the City of Covington*, 607 S.W.2d 126 (Ky. App., 1980). Therefore, even if the Board of Commissioners of Newport wanted to place the issue of nudity in bars on the ballot, it would not have the statutory authority to do so. *Id.* In Kentucky a particular issue can not be submitted to the voters, unless there is a specific statute authorizing its submission. No such statute exists in the Commonwealth, that would



enable the City to place the issue of nudity in bars on the ballot.

If the respondents' argument prevails, then neither the City or State could regulate nudity in bars because only the voters have the right to totally ban the sale of alcohol; and the voters in Kentucky could not ban nudity in bars because there is no statute authorizing the submission of such questions to the voters. The petitioners can not believe that this Court intended such a bizarre result when it decided *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981). Therefore, the petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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# OPINION

# SUPREME COURT OF THE UNITED STATES

## CITY OF NEWPORT, KENTUCKY, ET AL. v. NICHOLAS A. IACOBUCCI, DBA TALK OF THE TOWN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–139. Decided November 17, 1986

PER CURIAM.

In 1982, the City Commission of Newport, Ky., enacted Ordinance No. 0–82–85. This ordinance prohibited nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises.[1] A state law imposing an almost identical prohibition on nude dancing was upheld by this Court in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) *(per curiam)*, as being within the State's broad power under the Twenty-first Amendment[2] to regulate the sale of liquor within its boundaries.

Respondents, proprietors of Newport liquor establishments that offered nude or nearly nude entertainment, chal-

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[1] Newport Ordinance No. 0–82–85, § II, provides:

"It shall be unlawful for and a person is guilty of performing nude or nearly nude activity when that person appears on a business establishment's premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, or when any female appears on a business establishment's premises in such manner or attire as to expose to view portion of the breast referred to as the areola, nipple, or simulation thereof."

Sections IV and V specify criminal and civil penalties for any violation of the ordinance. A proprietor who knowingly permits the proscribed activity on his premises may have his occupational license and liquor license revoked.

Ordinance No. 0–82–85 is set forth in its entirety in the appendix to the Court of Appeals' opinion. See 785 F. 2d 1354, 1360–1362 (CA6 1986).

[2] The Twenty-first Amendment provides in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

lenged the ordinance in federal court. They contended that the ordinance deprived them of their rights under the First and Fourteenth Amendments, and they sought declaratory and injunctive relief under 42 U. S. C. § 1983 against its enforcement.[1] The District Court ruled that the ordinance was constitutional, stating that it "is squarely within the doctrine of *Bellanca* . . . and must be upheld on that basis." App. to Pet. for Cert. 50a.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed that judgment. 785 F. 2d 1354 (1986). It found the decision in *Bellanca* inapplicable because in Kentucky local voters, rather than the city or the Commonwealth, determine whether alcohol may be sold. Pursuant to the authority granted by the Commonwealth's Constitution,[2] Kentucky expressly authorizes a city to conduct a popular election on a question of local prohibition when a specified proportion of qualified voters petition for such an election. See Ky. Rev. Stat. §§ 242.010–242.990 (1981 & Supp. 1986). Noting this Court's statement in *Bellanca* that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," 452 U. S., at 717, the Court of Appeals' majority nevertheless concluded that

[1] Respondents also challenged a second Newport ordinance, see 785 F. 2d, at 1362–1363, requiring employees of establishments that sell liquor by the drink to register with the police department and be fingerprinted. The Court of Appeals upheld the constitutionality of this second ordinance as a valid implementation of the city's police power. *Id.*, at 1355–1358. That ordinance is not at issue here.

[2] The Kentucky Constitution, § 61, provides:

"The General Assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days."



the ordinance could not be justified under the broad authority bestowed by the Twenty-first Amendment. It stated that this case does not fall within the *Bellanca* "doctrine" or "rationale" because the city "cannot exercise in part a power it does not hold in full." 785 F. 2d, at 1358. The court remanded the case for a determination, among other things, of the city's authority to enact the ordinance under its police power. The dissenting judge argued that the majority read *Bellanca* too narrowly, and he contended that the city is not restricted solely to the exercise of the police power to regulate the liquor industry.

We agree with the the dissent's conclusion that this case is controlled by *Bellanca* and we therefore reverse. The reach of the Twenty-first Amendment is certainly not without limit,[1] but previous decisions of this Court have established that, in the context of liquor licensing, the Amendment confers broad regulatory powers on the States.

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California* v. *LaRue*, 409 U. S. 109, 114 (1972).

This regulatory authority includes the power to ban nude dancing as part of a liquor license control program. "In

[1] See, *e. g.*, *California* v. *LaRue*, 409 U. S. 109, 120, n. * (1972) (Stewart, J., concurring):

"This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution. See *Wisconsin* v. *Constantineau*, 400 U. S. 433; *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 329–334; *Dept. of Revenue* v. *James Beam Co.*, 377 U. S. 341."

*LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932–933 (1975). In *Bellanca*, the Court upheld a state statute imposing just such a ban.

The Court of Appeals misperceived this broad base for the ruling in *Bellanca* and seized upon a single sentence, characterizing it as the "doctrine" or "rationale" of *Bellanca*. Because a Kentucky city cannot ban the sale of alcohol without election approval, the court concluded that it similarly cannot regulate nude dancing in bars. In holding that a State "has broad powers . . . to regulate the times, places, and circumstances under which liquor may be sold," *Bellanca*, 452 U. S., at 715, this Court has never attached any constitutional significance to a State's division of its authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit.*

There is certainly no constitutional requirement that the same governmental unit must grant liquor licenses, revoke licenses, and regulate the circumstances under which liquor may be sold. Indeed, while Kentucky provides that the question of local prohibition is to be decided by popular election, the parties are in agreement that the city is vested with the power to revoke a liquor license upon a finding of a violation of state law, a state liquor regulation, or a city ordinance. See Brief in Opposition 7. Yet, the rationale of the opinion of the Court of Appeals implies that, because of the Kentucky Constitution, neither the State nor the city may revoke a liquor license under the authority of the Twenty-first Amendment. Only a strained reading of *Bellanca* would require each licensing decision to be made by plebiscite. Moreover, there is no statutory provision that gives the voters direct authority, once the sale of alcohol is permitted, to determine the manner of regulation. Thus, if respondents were to prevail in their argument that only voters can ban nudity because only voters have the authority to ban the sale of alcohol, it is possible that nude dancing in bars would be immune from any regulation.

*Because it found *Bellanca* inapplicable, the Court of Appeals did not reach the state-law question of delegation of authority by the Commonwealth to the city of Newport. We express no opinion on this issue.



The Newport City Commission, in the preamble to the ordinance, determined that nude dancing in establishments serving liquor was "injurious to the citizens" of the city. It found the ordinance necessary to a range of purposes, including "prevent[ing] blight and the deterioration of the City's neighborhoods" and "decreas[ing] the incidence of crime, disorderly conduct and juvenile delinquency." See 785 F. 2d, at 1360. Given "the added presumption in favor of the validity of the . . . regulation in this area that the Twenty-first Amendment requires," *California* v. *LaRue*, 409 U. S., at 118–119, it is plain that, as in *Bellanca*, the interest in maintaining order outweighs the interest in free expression by dancing nude. The fact that the Commonwealth of Kentucky has delegated one portion of its power under the Twenty-first Amendment to the electorate—the power to decide if liquor may be served in local establishments—does not differentiate this case from *Bellanca*.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Acosta* v. *Louisiana Department of Health and Human Services*, et al., —— U. S. —— (1986) (MARSHALL, J., dissenting).

# OPINION

# SUPREME COURT OF THE UNITED STATES

## CITY OF NEWPORT, KENTUCKY, ET AL. v. NICHOLAS A. IACOBUCCI, DBA TALK OF THE TOWN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–139. Decided November 17, 1986

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

As I have previously written, the reasoning in the *per curiam* summary disposition in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981), is "blatantly incorrect." *Id.*, at 718 (STEVENS, J., dissenting). Neither the plain language nor a fair construction of the purpose of the Twenty-first Amendment lends any support to the Court's holding that the Twenty-first Amendment shields restrictions on speech from full First Amendment review. Without repeating what I said in that opinion, I believe it important to highlight some of the fundamental defects in the Court's analysis.

At one time, not long ago, it was considered elementary that the Twenty-first Amendment merely created an exception to the normal operation of the Commerce Clause. See *Craig* v. *Boren*, 429 U. S. 190, 206 (1976). As the Court explained shortly after the Amendment's passage, the Amendment "sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc* v. *Reeves*, 308 U. S. 132, 138 (1939); see also *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936).

In *Craig* the Court flatly rejected the Twenty-first Amendment as a basis for sustaining a state liquor regulation that otherwise violated the Equal Protection Clause. The Court pointed out that, "[a]s one commentator has remarked: 'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'" 429 U. S., at 206 (quoting P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials 258 (1975)); see also *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982); *Moose Lodge*

*No. 107* v. *Irvis*, 407 U. S. 163, 173–179 (1972); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971).

In recent years, however, the Court has completely distorted the Twenty-first Amendment.[1] It now has a barely discernible effect in Commerce Clause cases, see *e. g. Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. —— (1986); *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 279 (1984), but, under *Bellanca* and the Court's decision today, it may be dispositive in First Amendment cases. This paradox cannot be overstated: reading *Bellanca* one would have thought that the Court was prepared to recognize some bite in the Twenty-first Amendment. The intervening decisions in *Brown-Forman* and *Bacchus* demonstrate, however, that it is toothless except when freedom of speech is involved.[1]

Were this internal inconsistency in interpreting the Twenty-first Amendment the only problem with the Court's analysis, that would still be enough to call these decisions into question. But the problem is far more severe and dangerous than that. The Court has a duty in this case to "assess the substantiality of the governmental interests asserted [and] determine whether those interests could

[1] The Court fails to explain how its treatment of freedom of speech in *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981), and this case is consistent with its discussion of the Twenty-first Amendment's lack of effect on the Bill of Rights in *Craig*. Nor does the Court mention that in a post-*Bellanca* decision it unequivocally rejected the notion that a State may "exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 122, n. 5 (1982). There was absolutely no discussion of any added presumption of validity in *Larkin*.

These vastly different effects that the Court has attributed to the Twenty-first Amendment can surely not be explained as reflecting a difference in the value that is place on free speech, from that which is placed on the Equal Protection Clause, or the Establishment Clause. In *Valley Forge College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), the Court firmly declared that there is no "principled basis on which to create a hierarchy of constitutional values." *Id.*, at 484. In so stating, the Court declined to afford the Establishment Clause any special respect. Yet today, the Court not only appears to reject the proposition that all constitutional values are equivalent, but actually concludes that some of the other values protected by the First Amendment are at the low end of the sliding scale.



be served by means that would be less intrusive on activity protected by the First Amendment." *Schad* v. *Mount Ephraim*, 452 U. S. 61, 70 (1981). Shirking this responsibility, the Court instead relies exclusively on the Twenty-first Amendment to sustain a regulation of speech that it assumes, *arguendo*, would otherwise violate the First Amendment. Through the use of a *per curiam* summary disposition, the Court concludes that municipal ordinances and state statutes regulating expression in business establishments licensed to sell liquor for consumption on the premises are equally immune from facial challenges predicated on the First Amendment.[2] Unlike its holding in *California* v. *LaRue*, 409 U. S. 109 (1972), the Court also concludes that there is no need to consider the substantiality of the evidence supporting the City's justification for its ordinance;[3] the articulation of a legitimate pur-

[1] *Bellanca*, of course, dealt with the Twenty-first Amendment's effect on a state statute, not on a municipality's ordinance. The distinction between States and their subparts is dispositive in some areas of the law. See, *e. g., Community Communications Co.* v. *Boulder*, 455 U. S. 40, 48–52 (1982) (antitrust immunity for "state action"); *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93–98 (1972) (Supreme Court's original jurisdiction); *Lincoln County* v. *Luning*, 133 U. S. 529 (1890) (Eleventh Amendment). Of course, in some other areas, a municipality is equated with the State. See, *e. g., Waller* v. *Florida*, 397 U. S. 387 (1970) (double jeopardy); *Avery* v. *Midland County*, 390 U. S. 474, 480 (1968) (Fourteenth Amendment).

These cases demonstrate that the "particular factual and legal context is all important" in determining whether the state/municipality distinction is relevant. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 430, n. 7 (1978) (Stewart, J., dissenting). Today, however, for the first time in the Twenty-first Amendment's history, the Court holds that it applies equally to municipalities. Until now, the Court had twice been faced with cases involving delegation of a state's Twenty-first Amendment authority, and it reserved passing on the delegation question in both cases. *See Grendel's Den*, 459 U. S., at 122; *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 933 (1975). I certainly would have thought that this question merits some analysis, even if it does not, in the Court's view, merit more than a *per curiam* summary reversal.

[2] In *LaRue*, California's Department of Alcoholic Beverage Control had held hearings on the problems that had become associated with nude dancing. Witnesses included representatives of law enforcement agencies, counsel and owners of licensed premises, and Department investigators. *LaRue*, 409 U. S., at 111. The evidence demonstrated that a wide range

pose in the preamble to the ordinance is sufficient. In the words of a student commentator, "one must inquire why the Court [chooses] to go to such extremes to avoid a first amendment analysis." Recent Developments—Constitutional Law, 19 Vill. L. Rev. 177, 185 (1973).

There are dimensions to this case that the Court's opinion completely ignores. To begin with, the Newport ordinance is not limited to nude dancing, "gross sexuality," or barrooms.[4] On the contrary, the ordinance applies to every business establishment that requires a liquor license, and, even then, its prohibition is not limited to nudity or to dancing.[5] The State's power to regulate the sale of alcoholic beverages extends to a host of business establishments other than ordinary bars. See Ky. Rev. Stat. §243.020(3)

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of illegal conduct, including juvenile prostitution, indecent exposure to young girls, rapes, and assault on police officers, was taking place in and around the nude dancing establishments. *Ibid.* The Court's decision to uphold the regulation was thus grounded in "the evidence from the hearings that [the Department] cited to the District Court." *Id.*, at 115. See also *Schad* v. *Mount Ephraim*, 452 U. S. 61, 69–73 (1981) (refusing to uphold infringement of First Amendment rights where the State did not present actual evidence to support its purported justifications for the statute). This case stands in striking contrast; the Court of Appeals stated that "no substantive evidence concerning the government's justifications for the ordinance was presented" to the District Court. 786 F. 2d 1354, 1359 (1986).

[4]This is not to say that an ordinance limited to barrooms would necessarily be valid. As I suggested in *Bellanca*, 452 U. S., at 723, n. 10, a barroom might be the most appropriate forum for this type of entertainment since the patrons of such establishments generally know what to expect when they enter and they are free to leave if they disapprove of what they see or hear. Cf. *Spiegel* v. *California*, 431 U. S. 916, 924 (1977) (STEVENS, J., dissenting) (bookstore's advertisement that it sold sexually provocative material put uninterested passersby on notice). This case is wholly unlike those in which we have recognized the legitimate interest in keeping pigs out of the parlor. Cf. *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (1978). As long as people who like pigs keep them in secluded barnyards, they do not offend the sensibilities of the general public.

[5]The ordinance makes it a crime for any female to appear on a licensed business establishment's premises "in such manner or attire as to expose to view any portion of the breast referred to as the areola, nipple, or simulation thereof."



(1981). For example, a theatre cannot sell champagne during an intermission without a liquor license. It is surely strange to suggest that a dramatic production like "Hair" would lose its First Amendment protection because alcoholic beverages might be served in the lobby during intermission.[6] See *California* v. *LaRue*, 409 U. S., at 121 (Douglas, J., dissenting).

Perhaps the Court would disavow its rationale if a city sought to apply its ordinance to the performers in a play like "Hair," or to a production of "Romeo and Juliet" containing a scene that violates Newport's ordinance. See *Southeastern Productions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). But such a disavowal would, I submit, merely confirm my view that the Twenty-first Amendment really has no bearing whatsoever on the question whether the State's interest in maintaining order in licensed premises outweighs the interest in free expression that is protected by the First Amendment—whether that interest is asserted by a dancer, an actor, or merely an unpopular customer.[7]

Similarly, I recognize that the Court's attention in this case is focused on the spectre of unregulated nudity, particularly sexually suggestive dancing. But if there is any integrity to the Court's reasoning on the State's power under the Twenty-first Amendment, it must also embrace other forms of expressive conduct or attire that might be offensive to the majority, or perhaps likely to stimulate violent reactions, but would nevertheless ordinarily be entitled to

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[6]It is of no consolation that the bar owner can retain nude dancing as long as he forgoes his liquor license, or that a theatre may run a production with some nudity as long as it does the same. See *California* v. *LaRue*, 409 U. S., at 136–37 (MARSHALL, J., dissenting). Even 23 years ago it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); see generally Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[7]One of the anomalies of the Court's approach, is that Newport's ordinance would presumably be subject to vastly different scrutiny were a bar owner to sell only liquor that is produced within the State. Since the Twenty-first Amendment deals only with a State's power to regulate "transportation or importation into" the State, it would have no effect on a Kentucky bar selling Kentucky Bourbon. In such a case, the full force of the First Amendment would apply.

First Amendment protection.[4] For example, liquor cannot be sold in an athletic stadium, hotel, restaraunt, or sidewalk cafe without a liquor license. According to the Court's rationale any restriction on speech—be it content-based or neutral—in any of these places enjoys a presumption of validity. It is a strange doctrine indeed that implies that Paul Robert Cohen had a constitutional right to wear his vulgar jacket in a courtroom, but could be sent to jail for wearing it in Yankee Stadium. See *Cohen* v. *California*, 403 U. S. 15 (1971).

Given these concerns, I cannot concur in yet another summary disposition that gives such short shrift to these issues, without even the benefit of briefing on the merits. *Bellanca* should not be applied, much less extended,[5] without taking cognizance of the intervening decisions that have further limited the effect of the Twenty-first Amendment in other areas. Moreover, I continue to believe that the Court is quite wrong in proceeding as if the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well.

I respectfully dissent.

JUSTICE SCALIA would grant the petition for a writ of certiorari and set the case for oral argument.

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[4] Notwithstanding the Court's broad pronouncements on the omnipotence of the Twenty-first Amendment, I would hope that it would still "be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may shew, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide." *Bellanca* v. *New York State Liquor Authority*, 50 N. Y. 2d 524, 531, n. 7, 407 N. E. 2d 460, 464, n. 7 (1980).

[5] See n. 2, *supra*.